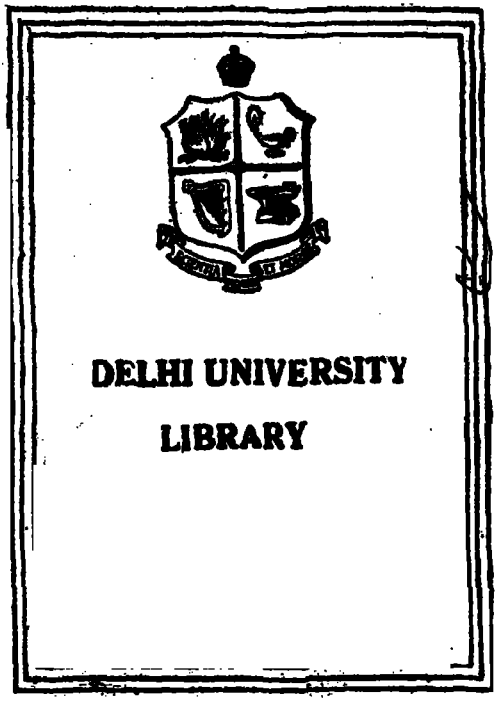

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LEGAL CONTROL OF THE PRESS

Concerning
those Potential or Actual Controls that affect
the Press, particularly Libel, Privacy,
Contempt, Copyright, Regulation of
Advertising, and Postal Laws

by

FRANK THAYER, M. A., J. D.
Professor of Journalism and Lecturer on Law of
the Press, School of Journalism, University
of Wisconsin; Member of the
Illinois Bar



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THAYER CONTROL OF PRESS

To

V. V.

PREFACE

NEWSPAPERS unfettered and unafraid insure the principles of democratic government. In the United States and component states there are guaranties of a free press but any serious student of journalism and government realizes the relativity of such guaranties. There are restraints upon the newspaper and periodical press, as well as upon radio. The various means of thought communication have rights but these rights may be abused and so cease in particular cases to be rights or privileges.

Fields for regulation of the press are legion, for certain legislative minds are alert to find new restrictions, and additional means of augmenting public funds. Sinister attempts by some officials and some advertisers have been made; consideration of such attempted controls lies however in the realms of ethics and business policy. Potential and actual controls of the press exist, but such controls do not necessarily mean contaminated, grasping, or dishonest influences.

Legal controls serve as a protection to the press as an institution of honest news portrayal and fair comment upon public affairs. Laws regulate conduct and establish rights. The press needs the protection established through these controls in order to function as a private business for the public interest. The controls fundamentally considered herein are the law as established for libel, privacy, contempt, copyright, and regulation of advertising.

The presentation of this study is based upon the experience gained in conducting classes and seminars in law of the press in the School of Journalism at the University of Wisconsin.

The student may think that when he studies law he will find all the answers; rather it is said, he will find the problems. Likewise, the student in that specialized course dealing with law as applied to writing and publishing may think that he will have a ready answer to all legal problems arising in his journalistic ac-

tivity. The truth is that in numerous cases the problem has never been judicially determined. Circumstances in particular cases differ; procedural rules, presentations of facts by counsel, and deliberations of juries are all factors that must be accepted as variables. The answers depend upon established rights correlated through such variables.

In presenting the material of this study, there has been an effort to make difficult problems understandable. Too obtuse legal technicalities have been avoided, but newspaper men need not hedge on some technical terms that are really significant; accordingly, such legal terms as demurrer, injunction, and writ of mandamus have not been side-stepped.

One journalism instructor remarked to the author that the trouble with some textbooks in this field is that the reader cannot always find out how a particular case came out. To show how a particular case came out is not always easy. The case may have come before the court on the defendant's motion to dismiss the complaint. If such a motion is denied, it would be indicated that the plaintiff has a prima facie case; an astute counsel for the publication might therefore advise his client to settle the case out of court, which advice if followed would mean that the real legal question would not come for determination before the final judicial tribunal of that jurisdiction.

Examples are based on actual cases, public records of judicial decisions. In a few instances hypothetical illustrations are presented.

The author acknowledges assistance from many unnamed sources including pioneers in this field of study, graduate students, lawyers, and newspapermen. This book would have been practically impossible without the efficient assistance and sympathetic consideration of Virginia Hill Thayer, whose efforts are highly appreciated. Prof. James J. Kearney, formerly of the College of Law, University of Notre Dame, with whom the author attended law school, is responsible for valuable suggestions and compilations of statutes affecting the press. Walter A. Steigleman worked with the author particularly in two surveys, one on privilege between newspaper reporters and their news sources, and another on police records as public records.

J. B. Martineau, Jr., counsel for the Chicago Tribune, has been helpful; results of his searching legal analyses have been gratefully shared with the author.

Judge Alvin C. Reis of the Dane County, Wisconsin, Circuit Court, has given some enlightening material on criticism of the courts. Wm. Scott Stewart of the Chicago Bar granted permission to use a quotation from his book, Trial Strategy. Little, Brown & Co. gave permission to use two quotations from Judge T. M. Cooley's Constitutional Limitations, and Case and Comment consented to the use of its summary on the law of privacy.

Acknowledgment is made to several publications which have used articles on legal subjects by this author, material from which articles has been adapted in this book; these publications include the American Bar Association Journal, the Wisconsin Law Review, the Notre Dame Lawyer, the Editor and Publisher, the Inland Press Association Bulletin, and the Quill published by Sigma Delta Chi, professional journalistic fraternity.

Thanks are in order also to the University of Wisconsin Law School Library staff for their generous assistance.

A debt of gratitude should be expressed to Prof. Grant M. Hyde, Director of the School of Journalism of the University of Wisconsin, who pioneered the course in law of the press at Wisconsin and who developed some instructional techniques that have proved helpful.

C. Joyce Ganssle worked patiently and efficiently for several years on legal research for this work. Ruth Jennings Miller deserves special commendation for her faithful work in editing a rather voluminous number of footnotes. Bernice Gibson and Kathryn Saucerman of the Library School of the University of Wisconsin are hereby thanked for their careful preparation of the index.

My trust is that this presentation will prove helpful to journalists, lawyers, and students, and that it will focus their interest on subjects so important to the press and the nation.

FRANK THAYER

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CHAPTER 1

THE HISTORICAL BACKGROUND

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§ 1. LEGAL CONTROLS

Society which has granted freedom of the press imposes well-defined obligations or correlative duties upon those who express themselves publicly.

Society has granted certain rights and privileges to the press; correlative to these rights and privileges society has imposed certain limitations or controls.

The freedom which the press enjoys has usually arisen only after the struggle of the common people for greater liberty of expression and more active participation in the affairs of government. These objectives have been attained with great effort and sacrifice in the fight against rapine, violence, bloodshed, and intolerance. To the publisher, the journalist, and the lawyer, especially, these rights may well be recognized as meaningfully symbolic of liberty.

Naturally, nations, in which representative government has been supplanted by some form of dictatorship, make little contribution to the subject except the unwise lesson of coercion unrestricted by rights such as have become a part of the American heritage. License is one category; liberty with responsibility for wrongful use is quite another. To enforce responsibility and to institute effectively regulations for the common good of society necessitate legal controls.

Control of an institution or activity implies the institution itself or the particular activity, its functioning to some purpose, and even a sound reason for such existence. To control may

mean complete power over a certain function, or on the other hand only regulation within certain limits.[1]

Two real tests for freedom of the press are, first, whether the press is restricted unreasonably by governmental action both prior and subsequent to publication and second, whether the press is at liberty to cover governmental activities and comment fairly and accurately thereon.

In any organized effort there are restrictions; the press is no different in this from any other phase of activity. The legal system that gives freedom of expression provides for administrative, punitive, and compensatory measures as a check upon abuses of the freedom permitted. If a paper wishes second-class mailing privileges, it need not have a license but it must conform to the post office regulations, free to any publication that so conforms. If a paper publishes a civil libel, the law provides the legal machinery to give the injured party his opportunity of redress. If a publication prints obscene material, it runs the chance of a fine or possible fine and imprisonment for its editor.

Legal control of the press does not mean government ownership or domination of institutions or publishing units; rather it means limitations or regulations which have arisen through the common law or legislation for protective, punitive, and compensatory purposes.

When this legal control is unwise, unjustified, or contrary to the economic enterprise of publishing, the press is to that extent unfairly restricted. On the other hand, some regulation is necessary for the very protection of the press itself. It is distinctly an advantage to the press to be able to protect its stories through the law of copyright and against piracy and unfair trade practices as related to the distribution of news as such or of the printed copies of its papers. Adequate post office regulations for distribution of papers under the second-class mailing privilege definitely accrue to the benefit and profit of the press; abuse of these post office regulations reflects unfavorably upon the press both socially and economically. In this instance, post office control is largely regulatory for the purpose of providing advantages to all who elect to utilize such privileges; it is punitive so far as abuse of the privileges generally offered is concerned. The law of copyright is likewise regulatory; it may become punitive

[1] Clark, J. M., Social Control of Business, gives an excellent discussion of social control.

for the abuse of copyright as well as compensatory to the individual whose rights have been infringed.

No appropriate understanding of the struggle for liberty of the press can be obtained without some historical aspect of the various controls, classified for both England and America under sedition, reporting of parliamentary bodies, license and censorship, taxation, treason, contempt, and copyright. For practical purposes under modern conditions the legal controls are essentially the law of libel, privacy, contempt, copyright, statutory regulation of dangers to sovereignty, post office regulations, the regulation of advertising, and some principles of the law of unfair competition. It should be noted, too, that the press is affected by administrative law especially concerning wages and hours, social security, workmen's compensation, interstate commerce, and interstate communication.

The publisher in his place as director of a business should have a deep appreciation of business law, as well as knowledge of its application to his daily problems. Possibly a publisher may think that a knowledge of the law will give him quick and certain answers to his legal problems; in such a conclusion he is mistaken.

Even an attorney cannot be sure of the answers to complicated legal problems; he can however recognize the problems. So the newspaper publisher, in his administration of the business, should be able to recognize the legal problems involved in his relationships with his advertisers, his subscribers, his employees, and the public. His awareness and his sensing of the possibilities of legal difficulties will at least cause him to give due consideration to a particular problem and moreover to confer with the legal counsel of the newspaper.

Further, a publisher should know how the law applies to the peculiar problems of the newspaper, especially as related to freedom of the press, libel, and contempt of court. Here, he should be able to sense the problems involved and in case of the least difficulty consult his attorney.

Newspapers are owned in proprietorship, partnership, and corporation types of organization. If one person owns an entire newspaper property, he obtains all the profits and of course becomes liable for all its losses; in case of loss, his entire personal resources are involved. For this reason newspapers requiring more than moderate capital are rarely owned in proprietorship. In a partnership, one partner is liable for the proportionate losses

of the business, and in case his partner or partners cannot pay their share of such losses, the solvent partner is liable for the extent of his personal fortune. On newspaper properties involving large capital requirements, men are not usually willing to risk their personal fortunes in a partnership.

The corporate form is the best form of organization for any newspaper property requiring large capital structure. In a corporation there is limited liability, ordinarily for the amount of the stock held; there is so-called perpetual organization or organization not necessarily limited to the life of the principal owner. A partnership is immediately dissolved upon the death of a partner; however, the principal owner of stock in a newspaper corporation may die, but the business continues as a going concern.

On smaller newspaper properties, where there is close supervision by the principal owner or owners, the proprietorship or partnership form is usually found satisfactory, especially in the weekly newspaper field.

The organization problem then concerns the newspaper owner vitally; he needs to know the essential legal problems which might arise because of the legal structure of his organization.

As a unit in the commercial life of the nation, the newspaper's operation is affected by business law, such as contracts, sales, bills and notes or negotiable instruments, creditor's rights, insurance, as well as the adjective law by which substantive rights in the respective commercial law branches are enforced. Commerce proceeds by means of legal protection. Newspapers in this respect are no different from other types of business enterprise; in the same fashion that a wholesale merchant or a stock broker must be able to know in advance his rights and liabilities so far as possible so the newspaper publisher needs to know whether his contracts are valid contracts that can be enforced.

Likewise, under present conditions of publishing, there are vast areas of statutory law affecting the press, particularly in regard to social security, wages and hours, workmen's compensation, and taxation; these fields necessitate knowledge of the law and careful administration in order not to incur liability. In these fields, it is well for the publisher to have good legal counsel so that he may operate within his rights.

The fields of law and those phases of their respective subject treatment affecting law of the press are, in the main, as follows:

Torts	Libel, privacy, and unfair competition
Criminal Law	Libel and contempt
Personal Property	Copyright and trade mark
Constitutional Law	Rights, guaranties of freedom of press, guaranty that liberty will not be deprived without due process of law
Administrative Law	Regulation of advertising through Federal Trade Commission, Securities and Exchange Commission, Post Office Department, Library of Congress, and Patent Office
	Regulation of circulation through Post Office Department
	Regulation of communications through Federal Communications Commission
Procedure	Enforcement of substantive rights, determination of damages, and injunctive relief where there is no full, complete, and adequate remedy at law

The press needs little apology; it is human and so subject to error. The great service of the press, however, stands parallel with the history of the American democracy. What several significant citizens have said about its place in society may well be quoted. Thomas Jefferson wrote:

> (A) No government ought to be without censors; and where the press is free, none ever will. [2]
>
> (B) When the press is free and every man able to read, all is safe. [3]

Henry Ward Beecher's opinion adds to the appraisal of the newspaper in American life, as follows:

> Newspapers are the schoolmasters of the common people. That endless book, the newspaper, is our national glory. [4]

Horace Greeley, long outstanding as editor of the *New York Tribune,* saluted the press thus:

> Then hail to the press! Chosen guardian of freedom!
> Strong sword-arm of justice! Bright sunbeam of truth.[5]

[2] Jefferson, Thomas, Writings, Vol. VIII, p. 406.

[3] Jefferson, Thomas, Writings, Vol. XIV, p. 382.

[4] Beecher, Henry Ward, Proverbs from Plymouth Pulpit: The Press.

[5] Greeley, Horace, The Press. The four references cited in this and fore-

These commendations, though of philosophical force, do not alter the necessity for the interpretation of historical inheritances in press freedom or for the study of legal controls, beneficial and otherwise, in the guidance of the Fourth Estate.

§ 2. FREEDOM OF THOUGHT PRECEDING THE RENAISSANCE

Both the Ancient World and the Middle Ages witnessed persecutions for the free expression of opinion.

Back of freedom of the press lie the related problems of freedom of thought and freedom of speech. History reveals that those in authority, whether in the name of established government or organized religious forces, often were quick to suppress speech or printing which they thought threatened their position or domination. Solon of Athens in 594 B.C.[6] instituted many constitutional reforms based upon morality and good citizenship; however, he forbade evil speaking of both the dead and the living.

Early philosophers and writers like Demosthenes (384?–322 B.C.)[7] and Euripides (480–406 B.C.) appreciated and championed liberty of opinion. Euripides[8] wrote:

> This is true liberty when free-born men,
> Having to advise the public, may speak free.

Concerning the Athenian law on liberty of expression, John Milton in his *Areopagitica* stated:

> In Athens where books and wits were ever busier than in any other part of Greece, I find but only two sorts of writings which the magistrate cared to take notice of; those either blasphemous and atheistical, or libelous.[9]

In 399 B.C. Socrates was sentenced to death because of his doctrines.[10] Christ was crucified by a mob because of his liberal teachings and his popularity with his followers; yet Pilate, the Roman magistrate, delivered him to the crowd.[11] Early Christians suffered martyrdom for their beliefs.

going footnotes on Jefferson, Beecher, and Greeley may be found in Burton Stevenson's Quotations.

[6] Myers, P. V. H., Ancient History (2d Rev. Ed.), p. 180.

[7] Patterson, G. J., Free Speech and a Free Press, p. 17.

[8] 3 Harvard Classics 193.

[9] Ibid., 203.

[10] Myers, P. V. H., Ancient History (2d Rev.Ed.), p. 242.

[11] St. Mark, 15:15—"And so Pilate, willing to content the people, released

Freedom of thought and religion was a policy of Rome [12] as a kingdom, republic, and empire until about the close of the fifth century, A.D., when began a thousand years of intolerance and when reason was enslaved and progress blocked.

The principle of persecution was advocated by St. Augustine [13] prior to 410 A.D. but it remained for Pope Innocent III to organize a campaign for the uprooting of those who opposed the early beliefs of the church. The Inquisition originated by Pope Gregory IX in 1233 A.D. and broadened by Pope Innocent IV in 1252 A.D. represents one of the darkest periods in suppression of freedom of thought. Though the Inquisitors probably thought themselves in the right, the evils of their system were the acme of intolerance.

Savonarola was executed in 1498 because of his teachings at Florence,[14] and Galileo who established that the Copernican system of astronomy was more workable than the Ptolemaic system, was accused of heresy, threatened with torture, and forced to revoke his opinion.[15]

Leaders of the Spanish Inquisition adopted the policy that it "was better a hundred innocent should suffer than one guilty person escape." [16] In trials for heresy real efforts to learn the truth were often absent; the rules of evidence steadfastly favored the prosecution, leaving the burden of proving innocence upon the accused. The court was essentially both judge and prosecutor.

§ 3. SEDITION IN ENGLAND

The development of printing in England gave new opportunities for discussion but fear of the possibilities of this new vehicle of expression caused the government to inflict severe punishments and hardships upon those who published contrary to the royal pleasure.

While oppression and intolerance of freedom in worship, opinion, and government mark the course of human history, the problem of overcoming these hazards has been best solved perhaps through the Anglo-American development of the concepts

Barabbas unto them, and delivered Jesus, when he had scourged him, to be crucified."

12 Bury, J. B., A History of Freedom of Thought, pp. 40–50.

13 Ibid., 55–58.

14 Schevill, F., A. Political History of Modern Europe, p. 33.

15 Bury, J. B., A History of Freedom of Thought, pp. 87–90.

16 Ibid., 61.

of inalienable rights. It is within the compass of this work to study this victory for freedom of opinion because the English legal tradition furnishes the background of America and because both the English and American press substantially stand in the fore of journalistic enterprise.

The printing art increased the means of discussion and opportunity for free thought, but such possibilities instilled fear and instituted vigorous censorship. Publication without the imprimatur of the licensing authorities brought the severest hardship and punishment. In England the foundation for such punishment was laid in the thirteenth and fourteenth centuries in the time of Edward I (1272–1307) and Richard II (1377–1399) when the Statutes of Scandalum Magnatum, or *de scandalis magnatum* were passed [17] providing that spoken words not ordinarily actionable in the case of the private person were actionable when spoken of a peer of the realm, or a judge, or of any of the great officers of the crown, without proof of special damage. The Statutes De Scandalis Magnatum were not taken off the English statute books until 1887, and so for a period of approximately 600 years this statutory authority was a threat to the English people, although enforcement of such law had long fallen into disuse.

After Caxton first used the printing press in England (1476), the Star Chamber was affirmed in 1487 during the reign of Henry VII (1485–1509). Under Henry VIII (1509–1547) the crime of treason was so wantonly extended as to include even the thoughts of men, who should by words, writing, imprinting, or any other exterior act, directly or indirectly, judge or believe contrary to the royal pleasure.[18] The king was authorized to learn upon oath the secret opinions of his citizens who if they disagreed with his majesty were subjected to the penalties of treason.[19] Both Bishop Fisher and Sir Thomas More were beheaded because they dared to question the ecclesiastical authority of the king.

Chief Justice Scroggs, following the expiration of the Licensing Act in 1679, declared into the common law of criminal libel the right of the government to license. This doctrine was used in the Trial of Benjamin Harris and the Trial of Henry Carr

[17] 3 Edw. I, Stat. Westminster 1, c. 34; 2 Rich. II, Stat. 1, c. 5; and 12 Rich. II, c. 11.

[18] 25 Henry VIII, c. 22; 26 Henry VIII, c. 13; 28 Henry VIII, c. 24; 32 Henry VIII, c. 25; 33 Henry VIII, c. 21.

[19] 28 Henry VIII, c. 7.

in 1680. At the trial of Carr for libel at the Guildhall of London, Chief Justice Scroggs indicated the extent to which he would go in the regulation of the press in the following opinion:

> When, by the king's command, we were to give in our opinion what was to be done in point of the regulation of the press; we did all subscribe, that to print or publish any newspaper or pamphlets of news whatsoever is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. Suppose now that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicite*, and the author ought to be convicted for it. And that is for a public notice to all people, and especially printers and booksellers, that they ought to print no book or pamphlet of news whatsoever, without authority.[20]

This theory of jurisprudence was not declared illegal until 1765, when Lord Camden judicially denied the doctrine in the famous case of Entick v. Carrington.[21] In the following year the House of Commons by resolution condemned the general warrant.[22]

Vigor of Star Chamber trials and their effectiveness in controlling printing may be illustrated by the case against William Prynn,[23] the statement of which case is as follows:

> Proceedings against Wm. Prynn, esq. in the Star Chamber for writing and publishing a book, intitled, "Histrio-mastix, or a Scourge for Stage-Players"; also against Michael Sparkes, for printing, and against William Buckner for licensing the said book: 9 Charles 1 1632–3.

Prynn had compiled and published the volume against plays, masques, dancings, and all other exercises of the people, as well as against hunting, public festivals, Christmas-keeping, bonfires and maypoles, and further against dressing up the house with green-ivy. Irrespective of Mr. Prynn's opinion which would certainly establish the fact that Mr. Prynn was either a prude or fanatic, his writings in the book condemned were charged as being seditious libel.

Because the Queen had a short time before taken part in a pastoral play at Somerset House, the court considered that in Prynn's reference to the fact that lewd women and whores were

[20] 7 Howell's State Trials 1111, 1127 (1680).

[21] 19 Howell's State Trials 1029, 1071 (1765).

[22] May, T. E., 2 Constitutional History of England, p. 252.

[23] 3 Howell's State Trials 561 (1632–3).

accustomed to take parts in plays, the inference was made, according to the prosecution, that a seditious libel had been made against the Queen. For this indiscretion, Prynn was fined £10,000 and given life imprisonment, in addition to being branded on the forehead, having his nose slit, and his ears cropt off; the book was ordered burned.[24] Prynn was later released by the Long Parliament on the ground that his trial had been illegal.

Severity of printing offenses did not lessen with the abolition of the Star Chamber in 1641, for the law of treason was utilized to restrict both freedom of speech and liberty of the press.

Prior to the time of Edward III the crime of treason was vague and poorly defined. Fundamentally, the crime of treason was based upon necessity for every man to give allegiance to his king, and in practice a slight breach of allegiance might be treated as treason. Particularly uncertain was the court's interpretation as to what might constitute a treasonable act.

While the law relating to treason goes beyond the strict limits of the personal rights of speech and press, the crime of constructive treason was interpreted to include both of these rights. It is in particular reference to this latter phase of treason that the subject is being considered here.

The Statute of 25 Edward III, st. 5, c. 2, limited treason to several definite classifications, among which were the compassing or imagining the death of the king, the queen, or their eldest son and heir, the levying of war against the king or the giving of aid and comfort to the king's enemies. Any traitorous act of compassing or imagining the king's death required some overt act. A conspiracy to take the life of the king was held to be an overt act. Words written or printed containing a compassing of the king's death were held overt acts; perhaps the classic example of such a decision was Twyn's case.[25]

At the session of Old Bailey in 1663 John Twyn was indicted and tried under the Statute of 25 Ed. III of high treason, for

[24] The accuracy of the report of this case in Howell's State Trials may be doubted to some degree. S. R. Gardiner, the English historian, contends that the date of the trial as given in Howell's reports is inaccurate. There is also a discrepancy in the terms of the sentence given Prynn, and also in the spelling of Prynn's name, which in Gardiner's History of England (Vol. 7, p. 329) is given as Prynne. Further according to Gardiner, the fine was £5,000 and the corporal punishment, life imprisonment, with the additional provision that Prynne be incapable of returning to the practice of law, that he be degraded from his degree at Oxford, that he be set in a pillory, and that his ears be cut off.

[25] 6 Howell's State Trials 513 (1663).

compassing and imagining the death of King Charles II. The overt act as stated in the indictment was the printing of a seditious, poisonous, and scandalous book, entitled, "A Treatise of the execution of justice, wherein is clearly proved that the execution of judgment and justice is as well the people's as the magistrate's duty, and if the magistrate's pervert judgment, the people are bound by the law of God to execute judgment without them, and upon them."

Several passages in the book were set forth in the indictment, to the effect that the supreme magistrate is accountable to the people, that the people were incited to take over the management of the government, even to taking up arms against the king and his family, and finally that the people were exhorted not only to cast off their allegiance but to put the king to death. Twyn was found guilty, and the sentence pronounced upon him by the court was as follows:

> God have mercy upon you; and if you do so, he will have mercy upon you. But forasmuch as you John Twyn have been indicted of high treason, you have put yourself upon God and the country to try you, and the country have found you guilty; therefore the judgment of the court is, and the court doth award, "that you be led back to the place from whence you came, and from thence to be drawn upon an hurtle to the place of execution; and there you shall be hanged by the neck, and being alive, shall be cut down, and your privy-members shall be cut off, your entrails shall be taken out of your body, and you living, the same to be burnt before your eyes; your head to be cut off, your body to be divided into four quarters and your head and quarters to be disposed of at the pleasure of the king's majesty. And the Lord have mercy upon your soul." [26]

In this case, it must be noted that Twyn was not the author of the book, only its printer, so far as evidence of the case shows.

In recent times the tendency in England has been to restrict the definition of treason. Under the Riot Act, I George, st. 2, c. 5, the government may deal with uprisings as a felony rather than as an act of treason.[27]

[26] Ibid. at 536.

[27] Taswell-Langmead, T. P., English Constitutional Law (9th Ed.) pp. 362, 363.

§ 4. THE WILKES' CASES

Criticism of the King's speech by John Wilkes in No. 45 of the *North Briton* gave rise to the flagrant use of the general warrant as a means of bringing to justice those suspected of seditious publications.

History of freedom of the press in English speaking countries could not well be written without recognition of the contribution of John Wilkes (1727–1797). Wilkes started the *North Briton* in 1762 in opposition to Lord Bute's paper, the *Briton,* edited by Tobias Smollett in defense of the government. Number 45 of the *North Briton* issued April 23, 1763, commented upon a speech of George III and the then recently concluded peace signed by Great Britain, France, and Spain. In this article Wilkes imported respect to the king, not sedition. "The King's speech has always been considered by the legislature and by the public at large as the speech of the minister," stated the article, which in addition gave a series of footnotes to support the conclusion that this speech might be criticized as freely as the speech of any other person. The inference of the article was clearly that the ministers themselves were responsible for putting lies into the mouth of a virtuous prince. Reaction to the Wilkes article was immediate; the government decided to proceed by the use of the general warrant, which mentioned merely the offense, not the person sought.

Lord Halifax issued the general warrant, authorizing several messengers and a constable to search for the authors, printers, and publishers of No. 45 and to arrest them and seize their books and papers. The article was deemed a seditious libel.

Wilkes was seized and committed to the Tower; however, on May 2, 1763, he was released on a writ of *habeas corpus* inasmuch as it was held that he was privileged as a member of the House of Commons.[28]

About the same time as the issuance of the alleged seditious libel against the king, Wilkes began the printing of an indecent poem, entitled, *Essay on Woman.* In the search of Wilkes' papers following the issuance of the general warrant, the government agents discovered some rough notes or papers concerning this literary effort. The government immediately decided to add

[28] 19 Howell's State Trials 981 (1763).

to the prosecution of Wilkes for seditious libel a charge of publishing an obscene and impious libel, in the hopes of shaking the support of the middle class who were convinced of Wilkes' sincerity and political integrity. Two informations were filed against Wilkes by the solicitor general, one for having published a seditious and scandalous libel, and the other for printing an obscene and impious libel. The first information was filed in the Michaelmas term, 1764, but Wilkes failed to appear on either charge and was accordingly outlawed. He was found guilty on both charges, but it was not until after he returned from his exile in France that he appeared before Lord Mansfield for sentence. For each libelous publication Wilkes was fined £500; for publication of the libel in No. 45 of the *North Briton* he was sentenced to ten months' imprisonment, and for publication of the *Essay on Woman,* an imprisonment of twelve months. He was bound over for a period of seven years in the amount of £1,000 on his own recognizance and £500 each on the part of two friendly sureties.

Wilkes had several deep gratifications, however, one the support of his followers, and the other a victory against Robert Wood in an action for trespass before Chief Justice Pratt in 1763. The action was based upon Wilkes' early imprisonment after the issuance of the general warrant to find the author of the seditious article in the *North Briton.*

In summing up the case Chief Justice Pratt noted that the defendants claimed a right, under precedents,

> to force persons' houses, break open escrutores, seize their papers, &c upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject. [29]

The jury, after withdrawing for half an hour, returned and found a general verdict upon the issues for the plaintiff, with £1,000 damages. The bill of exceptions offered by the defense, Chief Justice Pratt refused to grant.

Dryden Leach, a printer, was likewise placed under arrest on the ground of a general warrant when Lord Halifax was search-

[29] Wilkes v. Wood, 19 Howell's State Trials 1153, 1167 (1763).

ing for the author, printer, and publisher of No. 45 of the *North Briton*. The facts later disclosed that Leach was not the author, printer, or publisher of this publication. Leach, in the illustrative case of Leach v. Three of the King's Messengers,[30] sought damages of £2,000 for breaking and entering his house, and imprisoning him, without lawful or probable cause. The case came before Chief Justice Pratt on December 10, 1763, resulting in a verdict for the plaintiff for £400 and costs. The defendants immediately filed a bill of exceptions, which was later heard by four justices, Wilmot, Yates, Aston, and Lord Mansfield. Justice Wilmot declared that it was his opinion that the general warrant was illegal and void, while Justice Yates and Justice Aston both doubted the legality of the warrant, "for no degree of antiquity can give sanction to a usage bad in itself." Lord Mansfield, relying upon Hale and other authorities, stated an uncertain warrant void. The court affirmed the judgment of the lower court on the ground that the foundation of the defense failed.

It should be noted, however, that the only legal point decided in this case was that the general warrant was not pursued. Enough was stated by the court, as pointed out in the foregoing paragraph, to show that all four of the judges thought the general warrant illegal, except when such an instrument was granted on authority of Parliament itself.

The use of the general warrant was condemned in Entick v. Carrington[31] in 1765. On the premise that if the general warrant were to be upheld, Lord Camden stated:

> The secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect a person to be the author, printer, or publisher of a seditious libel.
>
> The messenger, under this warrant, is commanded to seize the person described, and to bring him with his papers to be examined before the secretary of state.

Entick was awarded a verdict of £300 and costs against Carrington and three of the King's messengers. In an elaborate and scholarly opinion the Chief Justice, Lord Camden, upholding the lower court, concluded:

> I have now taken notice of every thing that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of seditious libel, is illegal and void.[32]

[30] 19 Howell's State Trials 1001 (1765).

[31] Ibid., 1029, 1063, 1064.

[32] Ibid., 1074.

A bill to abolish the use of general warrants for either person or papers was passed in the House of Commons but was defeated in the House of Lords in 1766. Inasmuch however as the general warrant had been judicially declared illegal and popular sentiment was aroused against the use of this instrument, the dangerous instrument of the general warrant to restrain liberty and to control opinion was eliminated from English constitutional law.[33]

Wilkes' fight against various libelous charges won the admiration of the people of London and resulted in one of the greatest changes affecting newspapers, a change effected by statute, the Fox Libel Act, which placed the freedom of the press under the protection of the jury so far as determining what constituted criminal defamation.[34] This act was passed in 1792.

Scarcely had the public indignation for the prosecution of Wilkes subsided when one Almond, a bookseller, was prosecuted for selling a copy of Junius' "Letter to the King."[35] In this trial Lord Mansfield upheld two doctrines, not recognized by the common law; one was that the publisher of a libel was liable criminally for the acts of his servants, unless he was proved to be neither privy nor assenting thereto; this doctrine was defensible so long as exculpatory evidence was admitted but afterwards judges refused to admit such evidence on the ground that the publication of the libel was sufficient proof of the publisher's criminality. This brand of juridical procedure prevailed until the passage of Lord Campbell's act in 1843.

The other theory without general acceptance in the common law was that the court alone had the authority to pass upon the criminality of the alleged libel. On the trial of Woodfall,[36] the original publisher of Junius' "Letter to the King," on the charge of seditious libel, the jury realizing that they could not decide upon the criminality brought in a verdict of "guilty of printing and publishing only," which according to the court necessitated a new trial. Later at the trial of one Miller,[37] Lord Mansfield emphasized that the jury could concern itself only with the fact of publication and that the test of criminality was wholly within

[33] May, T. E., 2 Constitutional History of England, p. 252.

[34] Postgate, R. W., That Devil Wilkes, p. 52; 32 Geo. III, c. 60 (1792).

[35] 20 Howell's State Trials 803 (1770).

[36] 20 Howell's State Trials 895 (1770).

[37] 20 Howell's State Trials 869 (1770).

the province of the court; the jury boldly brought in a verdict of "not guilty."

The rights of juries to decide upon the criminality of an alleged seditious libel was brilliantly championed by Lord Erskine for the defense in the Dean of St. Asaph's case,[38] which Erskine in arguing for a new trial claimed was in fact no trial at all, for the defendant was found guilty without any investigation of his alleged crime. In this trial the defendant was acquitted when the court decided that the indictment was defective.

§ 5. THE FIGHT AGAINST UNFAIR PROSECUTIONS

Erskine, Fox, and Campbell steadfastly contended for better protection against unjust libel trials.

Lord Erskine came to the defense of Thomas Paine, whose publication, "The Rights of Man," chilled a fearful government clique. While Erskine did not attempt to endorse the book on its merits, he contended that there existed a right to discuss governmental affairs and that criminality existed only when the author attempts to excite the public to disobey the law. Although Paine was found guilty, Erskine's defense resulted in a marked public opinion against the unfairness of the judiciary in such cases. His plea in the Paine trial was in part as follows:

> The proposition which I mean to maintain as the basis of the liberty of the press, and without which it is an empty sound, is this:—that every man, not intending to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have dictated to him as truth, may address himself to the universal reason of a whole nation, either upon the subject of governments in general, or upon that of our own particular country.[39]

To the efforts of Lord Erskine in behalf of more fair procedures in prosecutions of libel, there should be added the sterling advocacy of C. J. Fox and Lord Camden, an advocacy which crystallized public opinion and which finally proved successful in bringing about the passage of the Fox Libel Act which gave the jury the authority in criminal libel cases to try the issue upon the whole matter shown in the information against or the indictment of the defendant.

[38] 21 Howell's State Trials 847 (1783–4).

[39] Case of Thomas Paine, 22 Howell's State Trials 357, 414–415 (1792).

In 1843 a Select Committee of the House of Lords was appointed to consider the law of defamation, which the House of Lords considered unsatisfactory, especially in that truth alone was at the time a complete defense. The belief was held that truth if permitted to be a complete defense would still cause wrong to certain individuals who had atoned for some error of conduct previously committed and possibly to others who were unfortunate in having some personal defect. It was recommended accordingly that truth should not be a defense to defamation unless published for the public benefit. This recommendation was adopted by Parliament, in Lord Campbell's Act, but was applicable only to criminal proceedings.[40] Later Parliamentary legislation has effected some amendments to Lord Campbell's Act, but fundamentally it is still as significant as originally passed in regard to truth published for the public benefit as a defense to criminal libel.

The question of freedom of the press in England did not end with the abolition of censorship, the Stamp taxes, and the passage of the Fox Libel Act. In the early part of the nineteenth century a libel could be either indictable by a grand jury or brought to the court's attention by an attorney general on a criminal information for a misdemeanor. One so charged with seditious libel on a criminal information could be brought before a court on a warrant and if he could not furnish two satisfactory sureties, he could be confined in the common goal until he could furnish such sureties or until he was discharged. The result was that this weapon against political libel was used to keep persons charged imprisoned for long periods awaiting trial. According to eminent authority, thirty-three such informations were filed in 1819 against booksellers and news agents for libel, but only thirty-three per cent of them was convicted.[41] While an action for libel may still be brought either at the instance of the attorney through a criminal information or by the King's Coroner, acting on the request of a private person, the settled practice now is not to grant an information for criminal libel unless the libel tends to interfere with the administration of justice or the applicant is a public person.[42]

In England there is generally a reticence about giving detailed accounts of private affairs of the King and Queen in the press.

[40] Gatley, Clement, Libel and Slander (3d Ed.), p. 173.

[41] Wickwar, W. H., The Struggle for Freedom of the Press, pp. 37–39.

[42] Ball, E. V., The Law of Libel and Slander, p. 173.

This reticence amounts to a self-imposed censorship which was apparent in 1936 when King Edward VIII showed a social interest in an American divorcee. The American press carried story after story on this highly interesting news, but the British press refrained from publishing the real story, which of course turned out to mean the abdication of Edward, who became the Duke of Windsor, and his marriage to his American friend, who then became the Duchess of Windsor.

§ 6. SEDITION IN COLONIAL AMERICA

The trial of Peter Zenger on the charge of criminal libel became significant in establishing freedom of the press in Colonial America and in crystallizing public opinion as a foundation for the American Bill of Rights.

Significant in the history of freedom of the press in America was the trial of John Peter Zenger, a German immigrant. The outcome of the trial was effective in establishing freedom of the press in Colonial America, in setting an early standard for libel law, and in formulating an historic setting for the establishment of democratic government. The background of the trial was essentially political.

The Dutch who had lost control of New Amsterdam to the English in 1664 were thrifty citizens and holders of considerable property; however, their rights were not always respected by the English officials. After the death of Governor Montgomerie on July 1, 1731, Rip Van Dam, a New York merchant of Dutch ancestry, who was senior member of the Executive Council, occupied the governor's chair until the arrival of Governor Cosby.

The new governor produced a royal order dated May 31, 1732, shortly after his arrival in New York in 1732, giving him one-half of the salary, fees, and other gains incidental to his employment, for the interim between his appointment and his actual assumption of office. Van Dam however felt that the salaries and fees that accrued during his incumbency really belonged to him and therefore refused to comply with the order in favor of Governor Cosby. He further asserted that Cosby had collected some £6,000 more than he, Van Dam, had collected and that therefore Cosby really owed him about £3,000. Governor Cosby instituted a series of arbitrary acts that fomented rebellious sentiment on the part of the colonists.

Grievances against Cosby multiplied as the colonists became disgusted with the conciliatory attitude and ceremony which he

affected in his conferences with members of the colony who had business with him. The story is told by Livingston Rutherfurd that after Cosby visited Albany he canceled a deed with the Mohawk Indians originally made for their own protection so that in the making of a new deed he would receive additional fees before the new instrument became effective.[43]

The opposition to the governor decided to have its own organ so arrangements were made for Zenger to publish the *Weekly New York Journal,* which first appeared on November 5, 1733, under the editorship of Zenger; the *Gazette* under William Bradford supported the governor.

The *Journal* in its first number published an article on freedom of the press, with particular allusions to Governor Cosby. Sensing the political situation, Zenger, on one occasion quoted a man who had left New York to live in Philadelphia, as follows:

> We see men's deeds destroyed, judges arbitrarily displaced, new courts erected without the consent of the legislature, by which it seems to me, trials by juries are taken away when a governor pleases; men of known estates denied their votes, contrary to the received practice, the best expositor of any law. Who is there in that province that can call anything his own, or enjoy any liberty longer than those in the administration will condescend to let them do it, for which reason I left it, as I believe more will? [44]

The foregoing article was one of alleged libelous statements on which the famous trial was based.

As the political battle waged, Cosby condemned "numbers 7, 47, 48 and 49" as "Scurrilous, Scandalous and Virulent Reflections" and ordered them to be burned. Governor Cosby offered a reward of £50 for the discovery of the author of these articles. The grand jury refused to bring a true bill against Zenger, but the attorney general charged by a bill of information that Zenger had committed criminal libel, following which issuance Zenger was arrested on November 17, 1734. Unable to post bond of £800, he was held in jail for approximately nine months.

When Zenger came up for trial on August 4, 1735, his counsel, James Alexander and William Smith, denied the competency of Chief Justice DeLancey and his associate, Judge Philipse. DeLancey considered the objections of counsel a clear contempt of court, making the following statement, "The matter has come

[43] Rutherfurd, L., John Peter Zenger, p. 21.

[44] Merrill, Samuel, Newspaper Libel, pp. 15, 16.

to a point that we must leave the bench or you the bar." Both Alexander and Smith were forthwith disbarred, leaving Zenger without legal counsel. When the case proceeded, Andrew Hamilton, commonly considered one of the ablest attorneys in the colonies and a close friend of Benjamin Franklin, came to Zenger's defense.

The publication of the articles in question was admitted. Hamilton offered to prove the truth of the alleged libel, but the court refused to admit this evidence. Inasmuch as the defense had no opportunity to examine its witnesses, Hamilton proceeded to sum up the case, in one of the most dramatic and significant documents in America's fight for liberty, and built up the argument emphasizing the jury's personal knowledge of the truth of the alleged libel, and appealing to the loyalties of the colonists for their own determination of the law. The vigor of Hamilton's emotional appeal to the hearts of the jurymen and their sense of justice may well be appreciated in the selected quotations from his address, as follows:

> Then, gentlemen of the jury, it is to you we must now appeal for witnesses to the truth of the facts we have offered, and are denied the liberty to prove; and let it not seem strange that I apply myself to you in this manner; I am warranted so to do, both by law and reason. The law supposes you to be summoned out of the neighborhood where the fact is alleged to be committed; and the reason of your being taken out of the neighborhood is because you are supposed to have the best knowledge of the fact that is to be tried; and were you to find a verdict against my client, you must take upon you to say that the papers referred to in the information, and which we acknowledge we printed and published, are false, scandalous and seditious; but of this I can have no apprehension. You are citizens of New York; you are really what the law supposes you to be, honest and lawful men; and the facts which we offer to prove were not committed in a corner. They are notoriously known to be true; and, therefore, in your justice lies our safety. * * *
>
> Gentlemen; the danger is great in proportion to the mischief that may happen through our too great credulity. A proper confidence in a court is commendable; but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the discretion of other persons. If you should be of opinion that there is no falsehood in Mr. Zenger's papers, you will, nay, (pardon me for the expression,) you ought to say so; because you do not know whether others, (I mean the Court), may be of that opinion. It is your right to do so, and there is much depending upon your resolution, as well as upon your integrity. * * *

> Men who injure and oppress the people under their administration provoke them to cry out and complain, and then make that very complaint the foundation for new oppressions and prosecutions. I wish I could say there were no instances of this kind. But to conclude, the question before the Court and you, gentlemen of the jury, is not of small or private concern; it is not the cause of a poor printer, nor of New York alone, which you are trying. No! it may, in its consequences, affect every freeman that lives under a British government, on the main of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery, will bless and honor you as men who have baffled the attempts of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors, that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power in those parts of the world at least, by speaking and writing truth. [45]

Following the tenets of the English common law as determined by the Court of the Star Chamber, Chief Justice DeLancey was probably correct so far as the principle of *stare decisis* would determine, for his administrative authority was derived from the home land and accordingly he held that the colony must follow the legal precedents controlling in England. The position taken by the chief justice, as one acceptable to Lord Mansfield, was that it was within the province of the court to determine the criminality of the charge and that the jury's duty was wholly to determine whether there had been publication and whether the meaning of the alleged libel was as stated in the indictment. The doctrine was clearly based upon the questionable theory that "the greater the truth the greater the libel." This theory never was true of civil libel, and prior to the Star Chamber period in English history was probably not accepted in criminal libel. The essence of the offense in the old Statutes of Scandalum Magnatum passed under Edward I and Richard II was the falsity of the charge against the great persons of the realm.

It is true of course that Chief Justice DeLancey's position was unpopular. The eminent counsel for the defense directed his attack against the unpopular position taken by the court; he emphasized that English law as applied in England should not be applicable in the colonies and that, after all, the truth of the

[45] For reports on Andrew Hamilton's speech, see Rutherfurd, Livingston, John Peter Zenger, pp. 198–241; also Hudson, Frederic, Journalism in the United States, from 1690 to 1872, pp. 85–90.

statements should be accepted as a complete and full defense. His play to the jury was both emotional and legally sensible. When the jury returned, its verdict was "not guilty."

The significance of the Zenger case lies principally in the crystallization of opinion against the legal position taken by the court; the seeds were sown unmistakably for liberty of speech and freedom of the press, which were in a comparatively few years to be foundation stones in American constitutional law.

§ 7. CONFLICTING VIEWS ON GUARANTY TO PRESS

Adoption of the Constitution did not satisfy public opinion in regard to freedom of speech and liberty of the press.

The Constitution of the United States, prior to the adoption of the first ten amendments, did not mention freedom of the press. The Constitution proposed in the constitutional convention of 1787 was ratified by eleven states so that the Continental Congress passed a resolution on September 13, 1788, to put the new Constitution into effect. North Carolina added her ratification the following year, but Rhode Island did not ratify the Constitution until 1790.

Some of the state conventions were so divergent in their opinions of the merits of the new Constitution that they ratified it with the understanding that some form of a federal guaranty of individual rights would be added. Between Alexander Hamilton and Thomas Jefferson there was a wide divergence of opinion on the guaranty of freedom of the press. Hamilton believed that no specific mention needed to be made to such a liberty, while Jefferson was equally as certain that such a provision should be guaranteed. Hamilton's views may be shown in the following quotation from *The Federalist:*

> On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two: in the first place, I observe, that there is not a syllable concerning it in the constitution of this State; in the next, I contend, that whatever has been said about it in that of any other State, amounts to nothing. What signifies a declaration, that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and

on the general spirit of the people and of the government. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights. [46]

The position of Jefferson in regard to a free press is stated in the following excerpt from a letter written at Paris, January 16, 1787, to Edward Carrington:

The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, & to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers, & be capable of reading them. [47]

Jefferson's position regarding the guaranties finally won and the first ten amendments to the Constitution were adopted in 1791. These amendments sprang from a distrust of a centralized government possessing far-reaching powers remote from the people themselves. This distrust had been inculcated in the minds of the colonists during pre-revolutionary days.

§ 8. CROSWELL'S CASE

Trial of Croswell emphasized the principle that truth when published for good motives and for justifiable ends would constitute a defense and the principle that the jury should determine both the law and the fact in a criminal libel case.

Party controversies continued unabated during the early part of the Jefferson administration. Denunciation of Jefferson and the Democrats was marked in the Federalist press. Harry Croswell, a Federalist editor of a small town paper, republished from a story in the New York *Evening Post* the following paragraph about Jefferson:

Jefferson paid Callender for calling Washington a traitor, a robber, and a perjurer; for calling Adams a hoary-headed incendiary, and for most grossly slandering the private characters of men who (sic) he well knew to be virtuous. [48]

[46] Alexander Hamilton in The Federalist (E. G. Bourne Ed.), Book 2, pp. 156, 157.

[47] Writings of Thomas Jefferson, (P. L. Ford Ed.), Vol. IV, pp. 359, 360.

[48] People v. Croswell, 3 Johns.Cas 337 (1804).

In the trial before a single justice in 1803, the defendant offered to prove that Callender had prepared a pamphlet entitled "The Prospect Before Us" containing the epithets on both Washington and Adams and that Jefferson had paid Callender fifty dollars as a reward for his literary efforts. The court held that truth was no defense and that "it was no part of the province of a jury to inquire or decide on the intent of the defendant, or whether the publication in question was true, or false, or malicious." [49]

Croswell was convicted upon verdict of the jury, but his counsel immediately moved for a new trial upon exceptions taken on the court's rulings. The motion for a new trial was scheduled for hearing at the May term, 1804. Alexander Hamilton volunteered to act as counsel for the defense, and in a speech notable for its brilliancy and knowledge of the law of libel made what has become an historic address. He maintained that "the liberty of the press consists of the right to publish with impunity truth with good motives for justifiable ends though reflecting on government, magistracy, or individuals."[50]

Hamilton's argument is summarized in part as follows:

> That its (liberty of the press) abuse is to be guarded against, by subjecting the exercise of it to the animadversion and control of the tribunals of justice; but that this control cannot safely be intrusted to a permanent body of magistracy, and requires the effectual coöperation of court and jury.
>
> That to confine the jury to the mere question of publication, and the application of terms, without the right of inquiry into the intent or tendency, reserving to the court the exclusive right of pronouncing upon the construction, tendency, and intent of the alleged libel; is calculated to render nugatory the function of the jury; enabling the court to make a libel of any writing whatsoever, the most innocent or commendable. * * *
>
> That, in respect to libel, there is no such specific and precise definition of facts and circumstances to be found; that, consequently, it is difficult, if not impossible, to pronounce that any writing is, *per se,* and exclusive of all circumstances, libellous; that its libellous character must depend on intent and tendency; the one and the other being matter of fact. * * *
>
> That, in determining the character of a libel, the truth or falsehood is, in the nature of things, a material ingredient, though the truth may not always be decisive; but being abused

[49] Merrill, Samuel, Newspaper Libel, pp. 20–22.

[50] Hamilton, Allan McLane, Life of Alexander Hamilton, p. 181.

> may still admit of a malicious and mischievous intent, which may constitute a libel. * * *
>
> That the doctrine of excluding the truth, as immaterial, originated in a tyrannical and polluted source, in the court of *Star Chamber;* and though it prevailed a considerable length of time, yet there are leading precedents down to the revolution, and ever since, in which a contrary practice prevailed. * * *
>
> That, in the general distribution of power, in any system of jurisprudence, the cognisance of law belongs to the court, of fact to the jury; that as often as they are not blended, the power of the court is absolute and exclusive. That, in civil cases, it is always so, and may rightfully be so exerted. That, in criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, are intrusted with the power of deciding both law and fact.[51]

On the hearing on the motion for a new trial, the court was evenly divided, thus allowing the verdict of the original trial to stand; however, the prosecution made no motion for judgment on the verdict. The effect of this case was so repugnant to the popular opinion of the state that the New York legislature in 1805 passed an act establishing a practice for accepting the defense of truth in criminal libel when such was published with good motives and for justifiable ends, and giving the jury the right to determine both the law and the fact under direction of the court. Following the passage of this law, the court, in the August term, 1805, unanimously awarded a new trial.[52]

Although Croswell lost the case, no effort was made to sentence him, and following the killing of Alexander Hamilton by Aaron Burr in a duel in 1804, removing one of the principal politicians of the period and the defendant's counsel, little reason existed for further prosecution of the case.

The Croswell case however enlightened the public further as to the evils of criminal libel and so crystallized opinion that the results of this legal battle, though insignificant in fact so far as Croswell was concerned, hastened in other states broad acceptance of two sound legal principles, first, that truth in criminal libel is a defense when published with good motives and for justifiable ends, and second, that the jury determines the law and the fact under the direction of the court. It is perhaps notable that it was not until 1843 that England through the passage of Lord Campbell's Act accepted the principle that in criminal libel truth would be a defense only when published for the public benefit.

[51] 3 Johns.Cas. 337, 360–362 (1804). [52] Ibid.; see added notation at 413.

CHAPTER 2

HISTORICAL BACKGROUND—THE STRUGGLE CONTINUES

Sec.
9. Reporting Parliamentary Debates.
10. Reporting Legislative Bodies.
11. License and Censorship.
12. Censorship in Colonial America.
13. Censorship and War.
14. Anarchy and Syndicalism.
15. Sedition and Espionage.
16. Taxes on the Press.

§ 9. REPORTING PARLIAMENTARY DEBATES

Although Parliament retains privilege to keep its debates secret, public policy and the democracy of English tradition have made open debates a part of Parliamentary government.

Secrecy of legislative proceedings has long been a thorn in the struggle for freedom of the press. As Taswell-Langmead indicates, the original reason for the desire of secrecy of Parliamentary proceedings in England was a protection against interference by the Crown.[1] Later the movement to withhold the information on debates and votes on bills in Parliament was designed to keep the constituencies of members in the dark regarding opinions expressed behind legislative doors.

In 1641 the Long Parliament gave permission to publish its proceedings in the "Diurnal Occurrences in Parliament" except that the actual speeches of members could not be published without the special permission of the House. For the purpose of preventing inaccuracies the House of Commons in 1680 ordered reports on votes and proceedings with the reservation that speeches could be reported only with the permission of the speaker. From the latter part of the seventeenth century Parliamentary records were eventually made public only through memoranda made by members.

The Bill of Rights enacted by Parliament in 1689 provided "That freedome of speech, and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or

[1] Taswell-Langmead, T. P., English Constitutional History, (9th Ed.), p. 720.

place out of Parlyament." [2] Thus there was constitutional authority for the absolute privilege of members in either House.

In 1695 John Locke published a report of a debate in the House of Lords, but the Privy council ordered that the report be burned. Debates however were printed anonymously in pamphlets and news letters.

Following the Revolution in England both the House of Lords and House of Commons passed frequent resolutions, particularly from 1694 to 1698 for the purpose of restraining the writing of news letters, which gave any account or minutes of Parliamentary debates, or otherwise interfered unduly with governmental affairs.

There were nevertheless numerous offenders, many of whom were punished for their attempts to inform the public about the affairs of state. In a country which was to set the pace for democratic rule, there was a real hunger on the part of the citizenry for news and opinion about controlling governmental bodies.

From the accession of the Elector of Hanover, with George I in 1714, abortive and partial reports appeared in such publications as the *London Magazine* and the *Gentleman's Magazine,* as well as Boyer's *The Political State of Great Britain.* The reports were somewhat disguised under such titles as, "Proceedings of a Political Club" and "Debates in the Senate of Magna Lilliputia"; Dr. Samuel Johnson prepared and published in the *Gentleman's Magazine* fictitious speeches in reports on Parliament, speeches which in the opinion of later critics ring with a considerable degree of authenticity.[3]

The House of Commons in 1722 passed the following resolutions:

> Resolved, That no News Writers do presume in their Letters, or other Papers, that they disperse as Minutes, or under any other Denomination, to intermeddle with the Debates, or any other Proceedings, of this House.
>
> Resolved, That no Printer, or Publisher, of any printed News Papers, do presume to insert in any such Papers any Debates, or any other Proceedings, of this House, or any Committee thereof. [4]

[2] 1 Will. and Mary, sess. 2, c. 2 (1689).

[3] Bleyer, W. G., History of American Journalism, p. 26.

[4] 20 Journals of the House of Commons, p. 99.

During the ministry of Sir Robert Walpole, the reporting of debates in the House of Commons was given particular consideration when some members felt that such reporting would lead to misrepresentation, and one member declared that if such discussions were reported he would not be "made accountable without doors for what he said within." [5] Accordingly the House passed a resolution in 1738 condemning the publication of its proceedings as "a high indignity and a notorious breach of privilege."

In 1771 Col. George Onslow, a member of the House of Commons, denounced R. Thompson, printer of the *Gazette,* and John Wheble, printer of the *Middlesex Journal* for printing debates of that House. Both printers were ordered to attend the House but they could not be found, whereupon the House offered a reward of £50 for the arrest of the printers, Thompson and Wheble, and certain other craftsmen. After a few days Wheble was arrested and brought before Alderman John Wilkes, who immediately discharged him on the ground that no crime had been committed.[6]

Thompson was arrested and brought before Alderman Oliver who discharged the prisoner inasmuch as he was "not accused of having committed any crime." Proceedings in these cases fomented serious difficulties in the House of Commons. The Lord Mayor (Brass Crosby), a member of the House, and Alderman Oliver, also a member, were imprisoned; after the six weeks' commitment they were released through the prorogation of Parliament. Both men were honored in a triumphal procession from the Tower of London to the Mansion House.[7] Following this political controversy, debates in both Houses were reported with impunity, although technically such reporting was a breach of privilege. Actual reporting was however hampered with many difficulties; frequently gross inaccuracies resulted. Reporters had no accommodations and frequently were obliged to wait for long periods in the halls or on the stairways; they were not permitted to take notes; and upon the request of a single member any stranger or reporter could be excluded, a practice which was employed in 1849, 1870, 1872,

[5] Anson, Sir William R., The Law and Custom of the Constitution, Part 1, p. 152.

[6] Postgate, R. W., That Devil Wilkes, pp. 183–187; Taswell-Langmead, T. P., English Constitutional Law, p. 722; May, T. E., 1 Constitutional History of England 394, gives R. Wheble as the printer of the Middlesex Journal.

[7] May, T. E., 1 Constitutional Law of England 390–401.

and 1874.[8] The exclusion of strangers upon the request of a single member was however modified in 1875, when the House of Commons passed a resolution whereby upon discovery of a stranger and a request by a member for the exclusion of such stranger, the Speaker would put the question for the decision of all the members.

In 1834 following the destruction of the Houses of Parliament by fire, galleries in temporary quarters were provided for the convenience of reporters, and similar provision was made in the present buildings. Two years later provision was made for the daily publication of division lists in the House of Commons; in 1857 the publication of division lists was authorized by the House of Lords. In 1835 Commons provided for the publication of Parliamentary papers and reports and their sale at a low price.[9]

The case of Stockdale v. Hansard[10] illustrates the conflicting theories of the House of Commons and the courts in 1836. Messrs. Hansard were the printers for the House, which had ordered the printing of reports of the Inspector of Prisons. In the reports it was mentioned that a book by Stockdale found in possession of prisoners was indecent and obscene. Stockdale sued Messrs. Hansard for libel. Lord Chief Justice Denman, in giving his decision for the plaintiff, stated: "The fact of the House of Commons having directed Messrs. Hansard to publish all their Parliamentary reports is no justification for their, or for any bookseller who publishes a Parliamentary report, containing a libel against any man."

Immediately the House of Commons became alarmed at this doctrine of the courts and declared that the publishing of such reports, votes, and proceedings as it might deem necessary was "an essential incident to the constitutional functions of Parliament." [11] Shortly thereafter Parliament resolved for any person to begin suit to question its privileges or for any court to decide any case inconsistently with the determination of either House would be a breach of privilege.[12] To offset the ruling in Stockdale v. Hansard and to strengthen the attribute of privilege Parliament passed an act which provided that all such ac-

[8] Taswell-Langmead, T. P., English Constitutional History, p. 723.

[9] Ibid., 724.

[10] 2 Moody and Robinson, 9, 174 Eng. Rep. 196; also see (1839) 9 A. and E. Reports, Eng. Q.B. 1; 112 Eng. Rep. 1112, 1151.

[11] May, T. E., 1 Constitutional History of England, p. 424.

[12] Taswell-Langmead, T. P., English Constitutional History, p. 725.

tions should be stayed on the production of an affidavit or certificate to the effect that any paper, the subject of an action, was printed on the order of either House of Parliament.[13]

To withhold information on Parliamentary debates is in strict legal concept a privilege of that legislative body, similar to other privileges that attach to membership. These traditional privileges include the right to provide for the due constitution of its body, the right to regulate its own proceedings, the right to have access to the Crown, the courtesy to have the most favorable construction placed upon its proceedings, freedom from arrest of its members immediately prior, during and immediately subsequent to its sessions except for treason, felony, and breach of the peace, and of special interest to this study, the right to enforce its privileges by fine or imprisonment of any member of the public, as well as the right to expel its own members if necessary to enforce the privileges of the House. The privilege of a member does not prevent his being cited for contempt of court.[14]

Parliamentary privilege as part of the unwritten English Constitution is the exclusive right of either House to decide what constitutes interference with its duties, its dignity, and its independence.[15] Its power to exclude strangers so as to secure privacy of debate closely follows the right of Parliament to prevent the publication of debates. Attendance at Parliamentary debates and the publication of debates are by sufferance only, although it is now recognized that dissemination of information on debates and Parliamentary proceedings is advantageous to English democracy and, in fact, necessary to public safety. By judicial dictum it has been stated that there is a right to publish fair and accurate reports of Parliamentary debates, but actually the traditional privilege of Parliament continues in conflict with judicial opinion. There is still a standing order [16] forbidding the publication of Parliamentary debates, an order that by custom and the right of sufferance has become practically obsolete; yet the threat of such an order and the possibility of a contempt citation for its abuse, should Parliament deem it advantageous to withhold some particular discus-

[13] 3 & 4 Vict. c. 9.

[14] Anson, Sir William R., The Law and Custom of the Constitution, Part 1, pp. 136, 137.

[15] Paterson, James, Liberty of Press, Speech and Public Worship, p. 106.

[16] Odgers, W. B., Libel and Slander, pp. 269, 270; 2 Commons Journal 209 (1641); May, T. E., 2 Constitutional Law of England, p. 405.

sion, serve as a check upon careless reporting and distorted comment.

The keystone in the modern reporting of Parliamentary proceedings came in 1868 in the decision of Chief Justice Cockburn in the celebrated case of Wason v. Walter.[17] The defendant in the *London Times* published a report of the select committee of the House of Commons, containing a paragraph charging another with having views hostile to the government. The court directed the jury that if it were satisfied that the report was faithful and correct, it was a privileged communication. The Court of the Queen's Bench later discharged a *rule nisi* which had been obtained for a new trial.

In an epoch-making opinion, the court drew an analogy between reports in courts of justice and reports in Parliament. It is incorrect to interpret the decision in Wason v. Walter as giving the press the right to report debates and proceedings of Parliament. The question actually decided in this case was "whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question."

While the opinion of the court may be regarded as persuasive authority for the right to report Parliamentary debates and proceedings, this part of the opinion is purely dictum. The issue concerned the extension of privilege to those who did actually publish such reports. In part, the court's opinion follows:

> What greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the houses of Parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community from the highest to the lowest looks with eager interest to the debates of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a Parliamentary debate is to be held liable to legal proceedings because the conduct of a particular individual may happen to be called in question? * * *
>
> For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faith-

[17] L.R. 4 Q.B. 73; 38 L.J.Q.B. 34 (1868).

fully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.[18]

Under the authority of this case, any fair and accurate report of Parliamentary proceedings is protected under the doctrine of qualified privilege. It should be noted however that in England under the urgency of war emergencies, Parliamentary debate may be withheld.

§ 10. REPORTING LEGISLATIVE BODIES

Technically Congress retains its legislative privilege; by sufferance and custom Congress is open to the Press. State legislatures are generally open to reporters, except when there is constitutional or statutory limitation.

Colonial America suffered from the unreasonable restrictions of English rulers, restrictions which played a significant part in the development of the American revolution.

In the colonial days of American journalism the colonist did not enjoy the right of free criticism of public men and affairs; such rights were won only after conflict with arbitrary rulers.[19] The colonial legislatures had legislative privilege which gave them full right to exclude reporters and to prevent publication of debates. Both the governors and the colonial legislatures were generally sensitive to criticism and were ever ready to use their authority to punish what seemed to them unfair criticism of their acts and policies. The experience of the *New-England Courant,* published by James Franklin, serves as clear evidence of the exercise of legislative privilege. In 1722 Benjamin Franklin, a young apprentice in his brother's office, added verve to the young publication by contributing with common-sense frankness articles under the pseudonym of "Silence Dogood." James' editorship trod upon dangerous ground when in his issue of June 4–11, 1722, there appeared a suggestion that the government had not been very aggressive in dealing with pirates off the New England coast. He was called to account and was imprisoned. The Council tendered a proposal to the Massachusetts Colony House of Representatives that the elder Franklin be placed under a peace bond and that he should print

[18] Wason v. Walter, (1868) L.R. 4 Q.B. 73, 90–96, 38 L.J.Q.B. 34.

[19] Greene, E. B., Provincial America, p. 202.

nothing without the approval of the Secretary; James was released.[20]

Irked by an anonymous pamphlet entitled "Monster of Monsters" the Massachusetts House of Representatives ordered the issue burned by the common hangman, and sought the arrest of its printer when and if he could be found. The pamphlet was a satire, in fact, rather humorously presented, but the legislators had been heckled so much that they had seemingly lost their sense of humor. David Fowle, a printer, was suspected and brought before the House. The evidence was against him and he was imprisoned for several days.[21]

In the Massachusetts colony, the General Court, in which were blended executive, legislative, and judicial functions, had such hybrid form of privilege that so far as control of the press was concerned, the issue of reporting the affairs of the Council and the House of Representatives did not emerge.[22] There were no newspaper accounts of legislative debates and proceedings until after the separation from England when the relations with the press were considerably liberalized.

The first Continental Congress in 1774 was held behind closed doors.[23] This policy of secrecy was followed in the second Continental Congress, which continued in existence until the Articles of Confederation went into effect in 1781;[24] in fact, in 1776, the names of the signers of the Declaration of Independence were withheld for six months, because of fear of prosecution for treason. Behind closed doors, the Continental Congress held back from its secret journals some of its most significant proceedings.[25] Sessions of the Continental Congress under the Confederation were convened in secret or closed sessions.[26]

The following extracts from the Secret Journals of Congress give some indication of the degree of privacy which obtained in the Congress under the Confederation:

> A. The Secret Journals of the Congress of the Confederation, directed by the foregoing resolutions to be published, are

[20] Bleyer, W. G., History of American Journalism, pp. 56–59.

[21] Duniway, C. A., Development of Freedom of the Press in Massachusetts, pp. 115, 116.

[22] Ibid., 150.

[23] Howard, G. E., Preliminaries of the Revolution, p. 290; 5 Hinds, Precedents of the House of Representatives, #7247, footnote 5.

[24] Channing, Edward. History of the United States, p. 82.

[25] Van Tyne, C. H., The American Revolution, pp. 85, 86.

[26] 1 Secret Journal of Congress, 1775–1788. See introductory statement.

at the Department of State in five manuscript volumes. The Journals of Proceeding relating to Domestick Affairs, are in one separate volume, and the History of the Confederation in another. Of the latter, the projected articles presented by Dr. Franklin, on the 21st of July, 1775; those reported in the handwriting of J. Dickinson, of the 12th of July, 1776; and those reported in a new draft on the 20th of August, 1776, by the committee of the whole, were kept secret, and have never before been published. The proceedings subsequent to the 8th of April, 1777, when this report of the committee of the whole was taken up and debated in Congress, were published from time to time in the publick journals. [27]

B. Jan. 8, 1777—resolved all debates be kept secret till the further order of Congress. [28]

C. On motion of Mr. Huston, seconded by Mr. Varnum:

Resolved, That no person whatsoever be permitted to take copies or extracts from the secret journal, or from any papers directed by Congress to be entered therein, or from any papers with respect to which secrecy is enjoined, or to require from the Secretary such copies or extracts, without the permission of Congress. (June 1, 1781) [29]

D. Resolved unanimously, That the whole of this matter be kept secret. (Concerning securing a loan from Europe.) (Jan. 10, 1783.) [30]

E. * * * and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy. (Nov. 15, 1777) [31]

The sessions of the Senate after the ratification of the Constitution in 1788 were secret until the Second Session of the Third Congress which opened on November 3, 1794. When the debate on the contested election of A. Gallatin of Pennsylvania was in progress, the Senate galleries were opened to reporters.[32] Earlier however, or in 1792, Philip Freneau was permitted to cover the Senate for his paper, the *National Gazette*.[33] Although the Senate held legislative prerogative to hold secret sessions, favored newspapers were given special privileges. An example

[27] 1 Secret Journals of Congress, 1775–1788 (introduction).

[28] 1 Secret Journals of Congress, 1775–1788, p. 52.

[29] 1 Secret Journals of Congress, 1775–1788, p. 223.

[30] 1 Secret Journals of Congress, 1775–1788, p. 258.

[31] 1 Secret Journals of Congress, 1775–1788, p. 360.

[32] 5 Hinds, A. C., Precedents of the House of Representatives, #7247.

[33] Lee, A. M., The Daily Newspaper in America, p. 480.

of such favoritism was evidenced in 1841 when in the assignment of desks for reporters, no such accommodations were provided for *New York Herald* reporters.[34]

Reporters attended the first session of the House of Representatives in 1789 with the tacit consent of its members; at the second session of the First Congress in 1790 reporters were permitted in the House of Representatives but in debate on the subject of the press the opinion was expressed that attendance of reporters should not be sanctioned by a vote and that no legislative authority should be given to the reports.[35]

The rule for secret sessions of the national House of Representatives dates from February 17, 1792, and December 30, 1793; however secret sessions were held earlier without the authority of a declared rule.[36] During the administration of President Jefferson (1801–1809), Samuel Harrison Smith requested permission to report debates from within the bar, permission which had been denied him by the speaker, and also by the members. At the second session however the Democrats had a majority which directed the speaker to assign places on the floor for reporters and stenographers.[37]

Since the War of 1812 the House has convened ordinarily with the galleries open. There was a secret session on December 27, 1825, on the occasion of a confidential message from President John Quincy Adams, who transmitted a copy of a confidential message of President Jefferson to both Houses of Congress on January 18, 1803, recommending an exploring expedition across the continent to establish relations with the Indians and to ascertain the nature and extent of the territory; there was no further necessity of secrecy.

There was also a secret session on May 27, 1830, for the purpose of receiving a confidential message from President Jackson.

On February 1, 1843, President Tyler communicated to the House certain documents which he requested be kept confidential and the message was referred without reading and did not appear in the Journal until February 25 of that year.[38] Records

[34] Bleyer, W. G., History of American Journalism, p. 196.

[35] Abridgment of the Debates of Congress 180, 181.

[36] 5 Hinds, A. C., Precedents of the House of Representatives, #7247.

[37] Bleyer, W. G., History of American Journalism, p. 131.

[38] 5 Hinds, A. C., Precedents of the House of Representatives, #7255.

of the House however show that there have been very few other occasions when secret sessions have been held.

When the rules of the House were revised in 1880, the rule on secrecy was retained, in slightly shorter form, inasmuch as the committee on rules believed that there might be occasion for its use.[39]

Legislative privilege obtains in congressional halls as well as in the Parliamentary halls of the mother country. Both the House of Representatives and the Senate enjoy privilege, which is essentially the same for each branch of the Congress. What constitutes privilege has been defined by Rule IX of the House of Representatives as follows:

> Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; second, the rights, reputation, and conduct of Members, individually, in their representative capacity only; and shall have precedence of all other questions, except motions to adjourn.[40]

Each House has the right to convene in secret.[41] In the House of Representatives Rule XXIX on secrecy, which has not been invoked for many years, provides that:

> Whenever confidential communications are received from the President of the United States, or whenever the Speaker or any Member shall inform the House that he has communications which he believes ought to be kept secret for the present, the House shall be cleared of all persons except the Members and officers thereof, and so continue during the reading of such communications, the debates and proceedings thereon, unless otherwise ordered by the House.[42]

In the House, Rule XXXV provides for the accommodation of reporters.[43]

[39] Ibid., #7247.

[40] Rule IX, Rules of the House of Representatives, 77th Congress, 1941, p. 300; see also 3 Hinds, A. C., Precedents of the House of Representatives, #2521, (1907).

[41] Rule XXIX, Rules of the House of Representatives, 77th Congress, 1941, p. 440; see also 5 Hinds, Precedents of the House of Representatives, #7247 and *footnote*; and 2 Hinds, Precedents of the House of Representatives, #1640.

[42] 5 Hinds, A. C., Precedents of the House of Representatives, #7247, (1907).

[43] Rule XXXV, Rules of the House of Representatives, 77th Congress, 1941, p. 446. Section 2 of this rule was originally adopted in 1857. It was amended in 1909, 1911, and 1916. Obviously the rule needs further amendment for the sake of accuracy; the United Press Associations is given as United Press Association; the International News Service is not

The rules in the Senate are equally clear. Rules XXXIV,[44] XXXV,[45] and XXXVI[46] concern secrecy and the press.

Under authority of the Federal Constitution to establish their own rules and under the inherent legislative privilege, both Houses of Congress may cite for contempt a member or a private citizen, or a corporation which interferes with its procedure or violates its rules.[47] Numerous instances of congressional citation for contempt may be found in the records of congress, but as it is in particular that this study concerns the press, mention will be made of a few instances in which reporters have been disciplined. Reporters for the *New York Tribune* were expelled from the House of Representatives for publications affecting the reputations of members, according to a resolution on March 4, 1846;[48] this proceeding would be seriously questioned today as an interference with freedom of the press, for where would such liberty lie, if the press could not criticize its servants in Congress?

In 1848 the Senate committed John Nugent for publishing a treaty pending in executive session; clearly this was a just sentence, for breaking faith and violating the traditional rule for secrecy in the senatorial consideration of delicate diplomatic relations.[49]

In 1855 the House of Representatives expelled William B. Chace from the floor for refusing to testify before a House committee;[50] two years later James W. Simonton of the *New York Times* was expelled because of his complicity in aiding the passage of a bill in Congress and in aiding a friend politically. To the same resolution which expelled Simonton, was added the name of F. C. C. Triplett several days later.[51] F. W. Walker, a newspaper correspondent, in 1860, was expelled from the reporters' gallery for misfeasance.[52]

mentioned; some of the associations as mentioned may well be questioned for accuracy.

[44] Rule XXXIV, Rules and Manual of the United States Senate, 1941, p. 38.

[45] Rule XXXV, Rules and Manual of the United States Senate, 1941, p. 39.

[46] Rule XXXVI, Rules and Manual of the United States Senate, 1941, p. 39.

[47] U. S. Constitution, Art. I, § 5; 2 Hinds, A. C., Precedents of the House of Representatives, sec. 1640 (1907).

[48] Ibid., Sec. 1636.

[49] Ibid., Sec. 1640.

[50] Ibid., Sec. 1632.

[51] Ibid., Sec. 1634.

[52] Ibid., Sec. 1638.

In 1871 the Senate arrested Z. L. White and H. J. Ramsdel for publishing without authority the Treaty of Washington.[53]

It has been long established that reporters may attend legislative sessions; however, this is a qualified right in most instances, and under parliamentary practices the body might clear the house if secret or confidential matters are being discussed.

As a rule, legislative proceedings and debates may be reported, unless confidential matters are under discussion. In the several states, the constitutions are the controlling authority for secrecy of legislative proceedings. In the following states no constitutional provision is made regarding attendance of sessions and reporting of proceedings: Arizona, Georgia, Kansas, Kentucky, Louisiana, Massachusetts, New Jersey, North Carolina, Oklahoma, Rhode Island, Virginia, and West Virginia.

The following state constitutions specifically mention that the sessions may be cleared when confidential matters are to be discussed:[54] Alabama, Arkansas, California, Colorado, Connecticut,

[53] Ibid., Sec. 1640, footnote.

[54] Alabama Code of 1940, Const. Art. IV, § 57; Pope's Digest of the Statutes of Arkansas 1937, Const. art. V, § 13; Deering's General Laws and Codes of California 1937, Const. art. IV, § 13; Colorado Statutes Annotated 1935 (1937 and 1939 session laws), Const. art. IV, § 6, and V, § 14; Connecticut General Statutes, Revision of 1930 (supplemented by 1937 Supplement to General Statutes), Const. art. III, § 11; Revised Code of Delaware 1935, Const. art. II, § 11; Annotated Statutes of Florida Const. art. III, § 13; Idaho Code Annual 1932, Const. art. III, § 12; Illinois Revised Statutes 1943, Const. art. IV, § 10; Baldwin's Indiana Statutes Annotated 1934, Const. art. IV, § 13; Code of Iowa 1939, Const. art. III, § 13; Revised Statutes of Maine 1930, c. 2, § 42, and c. 2, § 31; Annotated Code of Maryland 1939, Const. art. III, § 21; Compiled Laws of Michigan 1929 (with 1935 and 1937 supplements), Const. art. V, § 18; Minnesota Statutes 1941, Const. art. IV, § 19; Mississippi Code 1930 Annotated (1938 supplement) Const. art. IV, § 58; Annotated Statutes of Missouri, Const. art. IV, § 19; Revised Codes of Montana 1935, Const. art. V, § 13; Compiled Statutes of Nebraska 1929 (Compiled Statutes of Nebraska Supplement 1937), Const. art. III, § 11; Nevada Const. art. IV, § 66; Rev.Laws of N. H., Const. part II, art. 8; New Mexico Statutes Annotated (1929) and 1938 supplement, Const. art. IV, § 12; Thompson's Laws of New York 1939, supplement 1942, Const. art. III, § 10; Compiled Laws of North Dakota 1913 (supplemented 1925), Const. art. II, § 50; Throckmorton's Ohio Code Annotated, Baldwin's 1936 Revision (with 1939 supplement), Const. art. II, § 13; Oregon Comp.Laws Annotated 1940, Const. art. IV, § 14; Purdon's Pennsylvania Statutes, Const. art. II, § 13; Code of Laws of S.C. 1942, Const. art. III, § 23; South Dakota Code of 1939, Const. art. III, § 15; Michie's Tennessee Code 1938, Const. art. II, § 22; Vernon's Texas Statutes 1936, Const. art. III, § 16; Utah Code 1943, Const. art. VI, § 15; Pub-

Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

Under the provision of the Texas constitution,[55] the legislature is declared open at all times so that free opportunity is allowed the press to attend and report; however, it is submitted that the Texas legislature might go into executive session under the general parliamentary rule if that body votes so to do.

While the constitution of Maine does not make provision for reporting of legislative proceedings, the revised statutes, chapter 2, section 42, define the rights and privileges of the representatives of the press.

§ 11. LICENSE AND CENSORSHIP

Beginning with the Formation of the Stationers' Company in Queen Mary's reign, license and censorship prevailed with some exceptions, for almost one hundred and fifty years.

Printing presses were registered under Henry VIII and printing was restricted by the issue of letters patent.[56] The first patent for the office of the king's printer was granted by Henry VIII in 1529 to Thomas Berthelet. Only licensed books were allowed publication.[57]

Under Queen Mary (1553–1558), in 1556, the Stationers' Company was chartered for the control of printing; this company, more completely organized the following year, had the authority to carry out its regulations, as well as to enforce the proclamations and decrees of the Star Chamber in so far as it was possible to do so.

The organization of the Stationers' Company followed out the idea of craft groups for the purpose of recognizing and estab-

lic Laws of Vermont 1933, Const. c. II, § 8; Remington's Revised Statutes of Washington Annotated, Const. art. II, § 11; Wisconsin Statutes 1941, Const. art. IV, § 10; Wyoming Revised Statutes 1931 (1940 supplement), Const. art. III, § 14.

[55] Texas Constitution, Art. III, § 16—"The sessions of each House shall be open, except the Senate when in Executive session."

[56] Paterson, James, The Liberty of the Press, Speech and Worship, p. 49.

[57] 4 Encyclopedia Britannica (11th Ed.), p. 234.

lishing customs within the trade; another purpose was to give the Crown a better opportunity of controlling the printing industry.

In its membership there were included printers, bookbinders, and type-founders, as well as booksellers, although membership in the company was not required for those printers who were in business at the time the charter was granted.[58] Some printers did not join the organization at the time and so, at the beginning, the company did not obtain complete control of the industry.

After the organization of the company the trade was limited supposedly to members of the company. All books printed were required to be registered and a copy deposited with the office of the company. Among the members there was an understanding that there should be full respect of the rights to books on register and deposit. In effect, this was an informal beginning of copyright in England, although it was not until 1709 that the Statute of 8 Anne was passed.

In 1558 Elizabeth issued "injunctions" requiring that every book should be licensed by the Queen herself, members of the Privy Council, the Archbishop of Canterbury, by the Chancellor of either the University of Oxford or the University of Cambridge, or by other specified officers. Through the act of the Star Chamber in 1586, regulations for the control of printing were very much tightened. Printing presses were allowed at only Oxford and Cambridge, although previously presses were allowed in several additional provincial towns. Periodical visits were made by agents of the Stationers' Company to determine how many presses each printer had in his shop, the nature of his publications, the volume of impressions, and the number of workmen and apprentices in each plant. Frequently officers destroyed unlicensed books.[59]

Some of the greatest tyrannies occurred under Charles I (1625–1649) in whose reign the Star Chamber decreed that all books must be submitted to the Stationers' Company for registration and license before publication. In 1649 the Licensing Act was repealed, but a year later when the government was controlled by Cromwell the act was re-enacted, and was continued through the Restoration, although actually the people enjoyed a certain measure of freedom in expressing their opin-

[58] Hamilton, F. W., History of Printing, p. 26.

[59] Ibid., 22, 23.

ions. In 1662 the Licensing Act was re-adopted for three years and for succeeding periods until 1679 when it expired. Under the Licensing Act of 1662, printing was limited to London and York, the University of Oxford and the University of Cambridge, the number of printers was limited to twenty, and publication of any book or pamphlet was prohibited unless licensed. Books that were regarded as obnoxious were burned by the common hangman, and their authors and printers were fined, imprisoned, flogged, mutilated, or hanged. Following the expiration of the act in 1679, Chief Justice Scroggs announced the doctrine that any publication of criticism against the government, favorable or unfavorable, true or false, without license, would be criminal at common law.[60]

The Licensing Act was revived again in 1685 for seven years and then renewed under William and Mary in 1692. In 1695 Parliament denied further renewal of licensing the press, thus ending a long period of suppression and attempted control of opinion through license and censorship. The English people were then free of license and censorship.

§ 12. CENSORSHIP IN COLONIAL AMERICA

English colonial governors and legislatures assumed the prerogative of censorial dictatorship.

The early history of freedom of the press in the United States indicates the autocratic policy of those in authority, a smart and a burden not forgotten in the Constitutional convention of 1787. The early colonial governors were given the right to regulate the press, particularly those governors sent over by the mother country between 1686 and 1730. According to C. A. Duniway,[61] who has done much research upon the early history of freedom of the press in America, the instructions granting these colonial governors their authority included the following paragraph:

> And forasmuch as great inconvenience may arise by liberty of printing within our said territory under your government you are to provide by all necessary orders that no person keep any printing-press for printing, nor that any book pamphlet

[60] Taswell-Langmead, T. P., English Constitutional Law (9th Ed.), p. 738.

[61] Duniway, C. A., The Development of Freedom of the Press in Massachusetts, pp. 64–69.

or other matters whatsoever be printed without your especial leave and license first obtained. [62]

Restriction of the press in early colonial America may be typified by the report of Sir William Berkeley, governor of Virginia, in his report to the Lords of Committee for the Colonies in 1671, in which he stated:

> I thank God we have not free schools nor printing; and I hope we shall not have these hundred years. For learning has brought disobedience and heresy, and sects into the world; and printing has divulged them and libels against the government. God keep us from both. [63]

Censorship was an assumed prerogative of colonial governments in America. Although it can hardly be asserted that censorship was part of the common law, especially after the Star Chamber had been abolished in England, some control of printing was regarded as common practice and to a degree justified under the police power.[64]

The General Court of Massachusetts in 1662 passed the first formal censorship act in that colony, as follows:

> For the prevention of irregularitjes & abuse to the authority of this country by the printing presse, it is ordered, that henceforth no copie shall be printed but by the allowance first had & obteined under the hands of Capt. Daniel Gookin & Mr Jonathan Mitchel, vntil this Court shall take further order therein. [65]

As there were no printing presses in the colony other than two in a printing establishment at Harvard College, the foregoing order applied to that shop only. The following year the General Court rescinded its order, seemingly on the ground that the Harvard printing shop had not indulged in disorderly printing. A private commercial shop was however shortly thereafter established by Marmaduke Johnson and in the opinion of the colonial government created a new emergency, in light of which the General Court in 1665 again passed a censorship and license act limiting printing to Cambridge, naming censors and inflicting penalties for non-observance of the order.[66] When Benja-

[62] Ibid., 65.

[63] Lee, J. M., History of American Journalism, p. 50.

[64] Hamilton, F. W., Printing in America, p. 8.

[65] Duniway, C. A., The Development of Freedom of the Press in Massachusetts, pp. 41, 42.

[66] Ibid., 47, 48. The date for this order is sometimes incorrectly given as 1664.

min Harris established the first newspaper in America, *Publick Occurrences* in 1690, he ran afoul of the authorities, who feared the influence of a publication devoted to news. His paper was accordingly suppressed. Fourteen years elapsed before John Campbell brought out the *Boston News Letter* in 1704, bearing an announcement that the paper was "published by authority."

Following the James Franklin case which arose when he published a criticism of the government in 1722, and so offended legislative privilege, the General Court handled the difficulty as a license and censorship problem, giving an order that Franklin should not "print, or publish the *New-England Courant,* or any Pamphlet or paper of the like Nature, Except it be first Supervised, by the Secretary of this Province." Franklin did not obtain a license for the *Courant* and he was arrested accordingly for his contempt of the court's order.[67] An indictment failed and Franklin was discharged. This case ended the restrictive censorship of the press in the Massachusetts colony.

The history of freedom from license and restrictive censorship in Massachusetts is illustrative of efforts in other colonies for government control.

§ 13. CENSORSHIP AND WAR

Lessons learned in World War I used to make effective "voluntary" domestic censorship in World War II.

Censorship may take several forms.[68] There may be

a. Voluntary censorship of domestic news.
b. Voluntary censorship of news intended for foreign distribution.
c. Enforced censorship of local news, with a censor in newspaper and press association office.
d. Enforced censorship of all outgoing cables, wire communications, and radio through a censorship regulation in the communication agency offices.
e. Pseudo-voluntary censorship by correspondents themselves, who know that if stories are released which violate the rules and are deemed damaging to the sovereignty and military interests of a country, they will be denied further privileges and so become practically useless to their home newspapers.

In addition there are of course other forms of censorship less apparent than real perhaps but none the less effective. Govern-

[67] Ibid., 101, 102.

[68] Desmond, Robert W., The Press and World Affairs, pp. 146, 147, 269, 328, 360, 366, 375.

ment leaders may take newspapermen into their confidence and advise them of significant facts on condition that they will not reveal the information; this censorship of confidences may become unusually effective in bottling up important news. Censorship may be clamped on by business interests which threaten the business department of the publishing company; and, from a social viewpoint, the readers themselves exercise a censorship which might result in a change to another newspaper; all publications face this type of censorship, a type in fact with which this study is not here concerned.

World War I developed a full-fledged censorship. There had been, however, censorial activity on the part of the Federal government even after the Sedition Act of 1798. After the defeat of the British at New Orleans in 1815, the *Louisiana Gazette* published a story on the conclusion of peace negotiations between the United States and England. General Andrew Jackson communicated with Godwin B. Cotten, editor of the *Gazette,* stating in part the following:

> Henceforth it is expected that no publication of the nature of that herein alluded to and censured will appear in any paper of this city unless the editor shall have previously ascertained its correctness, and gained permission for its insertion from the proper source.[69]

When the editor protested General Jackson imprisoned him; the incident was closed however when peace was officially proclaimed within a few days.[70]

During the Civil War, the War Department instituted a censorship over telegraphic communication, and the Post Office Department denied use of the mails to newspapers which the Postmaster General deemed disloyal. Thousands of citizens lost their personal liberties by action of army officers, United States marshals and state and local authorities; the number of persons so affected has been variously estimated at figures ranging from 13,000 to 38,000.[71]

Censorship at times amounted to suppression; for example, Edmund Ellis, publisher of the Boone County, Missouri, *Standard,* printed articles favoring the Confederacy in 1861 and 1862. Ellis was found guilty of publishing information helpful to the enemy and of encouraging resistance to the United States. He

[69] Correspondence of Andrew Jackson, V. 2, p. 179.

[70] Mock, James R., Censorship 1917, p. 9.

[71] Ibid., 10, 11.

was ordered outside the lines for the duration and his newspaper property confiscated.[72] The *Bee,* the *Crescent,* and the *Delta* were suppressed in New Orleans. In Memphis the *Argus* was suppressed and the *Avalanche* was ordered either suspended or its editorial writer discharged.[73] By military order the *New York World* and the *New York Journal of Commerce* were suppressed for several days in 1864.[74] The previous year the *Chicago Times* was suppressed for a short period.[75]

The Navy Department in 1914 was directed by President Woodrow Wilson to take over all wireless stations, and the War Department exercised a censorship over military information concerning the relations of the United States with Mexico. Early in 1917 cables, telegraph and telephone communications were placed under the censorship of the War and Navy departments. After the passage of the Espionage Act of 1917 the Department of Justice in effect exercised a censorship, and under authority of the same act, as well as the Trading with the Enemy Act, the Post Office Department set up a strict censorship. The Censorship board was immediately organized as representing the Post Office, the War and Navy Departments, the War Trade Board, and the Committee of Public Information.[76] The latter, developed under the leadership of George Creel, became the effective agency for dealing with the press. To a considerable degree a voluntary censorship was invoked by the press itself, but despite this provision, the postal authorities stopped the partial distribution of numerous newspapers and periodicals. For example, the entire mailing of the *El Paso Herald,* issued June 6, 1918, and intended for distribution in Chile, was held at New Orleans because that paper carried a story that 1,800 shopmen had struck for higher wages.[77]

The beginning of World War II for the United States saw the institution of a strict censorship. An executive order in December 1941 created the Office of Censorship. While there was no specific law authorizing a domestic press censorship, there was

[72] Ibid., 13.

[73] Lee, J. M., History of American Journalism, pp. 289, 290.

[74] McLaughlin, A. C., Constitutional History of the United States, p. 627; Mott, F. L., American Journalism, p. 351; Hudson, Frederic, Journalism in the United States, pp. 373, 670; Payne, G. H., History of Journalism in the United States, p. 322.

[75] McLaughlin, A. C., Constitutional History of the United States, p. 627.

[76] Mock, James R., Censorship 1917, pp. 55–57.

[77] Ibid., 134.

authority in the War Statutes, passed in 1938,[78] for restricting the dissemination of certain kinds of pictures, photographs, maps, designs, and the like when these covered military installations. The President's order directed the director of censorship to operate a mandatory censorship of a peripheral nature, as specified in the War Powers Act of December 1941; the President's order directed the director of censorship to operate a voluntary self-censorship for the domestic press and radio. The Espionage Act of 1917 and its amendment in 1940, the Sabotage Act, and the Trading with the Enemy Act of course covered wilfull transgressions, which would have to be reviewed by jury.

Byron Price, executive news editor of the Associated Press, was appointed Director of the Office of Censorship. Mr. Price immediately formulated rules and suggestions for both press and radio. The Code of Wartime Practices, as revised February 1, 1943, requested the suppression of all war information which might reveal troop movements or otherwise help the enemy.

Censorship under World War II was readily accepted by both press and radio, although there was severe criticism on the part of numerous newspapers that the censorship was too strict and that it was being used to cover up administrative mistakes. The exact naval losses at Pearl Harbor on December 7, 1941, were withheld one year on the announced ground that the Japanese should not have been given information on the extent of the damage because if the Japanese military had known what tremendous loss was incurred, the enemy could easily have attacked or even captured the Hawaiian Islands. The press generally had faith in the censorship because of its able head. There seemed no danger that the censorship office would be tied up with a positive propaganda effort.

Censorship may embrace only the withholding of facts; it is more dangerous to democracy if its scope is stretched to stop honest criticism, and even more dangerous if it is turned into a propaganda mechanism. In World War I the Committee on Public Information under Mr. Creel played both functions, censorship and propaganda. Fortunately, in World War II these functions were separated, with Mr. Price, an able newspaperman, as Director of Censorship and Elmer Davis, another able newspaperman, as head of the Office of War Information, which acted as a propaganda agency for the government.

[78] 50 U.S.C.A. c. 4A, § 45.

§ 14. ANARCHY AND SYNDICALISM

State enactments punishing advocacy of insurrection against either the state or Federal government have been upheld constitutionally on the ground of public policy.

Conspiracy to overthrow established government by force has long been the target of rulers and legislative bodies. People v. Lloyd [79] illustrates how one state, Illinois, handled this problem in judicial enforcement of a conspiracy statute. In 1920, thirty-nine members of the communist labor party were indicted by the grand jury of Cook County, twenty of whom were arrested, tried, and convicted. The felonies and other unlawful acts charged were violations of the Act of June 28, 1919, which declared any act unlawful:

> openly to advocate by word of mouth or writing the reformation or overthrow by violence or any other unlawful means of the representative form of government now secured to the citizens of the United States and the several states by the Constitution of the United States and the constitutions of the several states.
>
> To publish, issue, or knowingly sell or distribute any book, paper, document or other written or printed matter which advocates crime and violence as a means of accomplishing the reformation or overthrow of the constitutional representative form of government so secured to the citizens of the United States and the several states.
>
> To organize, aid in the organization of, or become a member of any society or association, the object of which is to advocate the reformation or overthrow of the existing form of government by violence or other unlawful means.

The Act provided further that any violation of the provisions constituted a felony, and that any one who voluntarily attended any such assembly with the knowledge of its purpose would be guilty of a misdemeanor.

The plaintiffs in error contended that the Illinois statute was unconstitutional upon the ground that Congress is the only legislative body which has the power to make such advocacy unlawful. The court overruled the contention stating that there is nothing in the Federal constitution granting to the Federal government the exclusive right to punish disloyalty.

Closely allied with seditious libel is the crime of conspiracy to overthrow established government by force or other unlawful

[79] 304 Ill. 23, 136 N.E. 505 (1922).

means. One of the outstanding cases of this character is Spies v. People,[80] known as the Haymarket riot case.

Records in this case show that in 1886 there was a conspiracy, the object of which was the destruction of the government and a complete revolution of society by means of force and terrorism rather than through the ballot box. A secret meeting of local anarchists determined that when the German word "Ruhe" meaning "peace" should appear in a certain column of a newspaper edited by August Spies, later convicted as one of the conspirators, bombs were to be thrown at police stations and police were to be shot as they came from their various stations. A mass meeting was planned at Haymarket Square, near the Desplaines street police station; this meeting was announced by the distribution of incendiary handbills among thousands of working men, many of whom were on strike or out of employment. Mayor Harrison of Chicago, hearing rumors indicating violence, ordered the police to watch the meeting and in event of disorder to break up the meeting. One hundred and eighty officers were centralized at the Desplaines street station. Fielden, one of the conspirators, called for the murder of "capitalists" and worked the crowd into a frenzy. On a report of disorder the police marched near the crowd and the commanding officer declaimed: "I command you, in the name of the People of the State of Illinois, to immediately and peaceably disperse," in accordance with the then Section 253, Division I, of the Criminal Code of the state. An unknown person threw a bomb, killing and wounding several police officers. Police opened fire with rifles and revolvers and dispersed the crowd. Many of the anarchists who had urged violence did not attend the meeting, but those who did attend ran away. Eight of the conspirators however were captured and were tried for murder. Seven were convicted of murder with a penalty of death, and one received a sentence of fifteen years in the penitentiary.

The questions in this case concerned murder and conspiracy; however, sedition and overthrow of the government were the paramount purposes of the conspiracy; part of the plan was the issuance of inflammatory literature, including Spies' newspaper, "Arbeiter Zeitung". Spies had an editorial in his paper the Tuesday afternoon of the riot, in which he stated: "Then do not delay a moment; then, people to arms! Annihilation to the

[80] 122 Ill. 1, 12 N.E. 865, 17 N.E. 898, 3 Am.St.Rep. 320 (1887).

beasts in human form, who call themselves rulers." [81] Further, an editorial, proved to have been written by Spies himself, appeared that afternoon, stating in part: "The murderous capitalistic beasts have become drunk with the smoking blood of laborers. The tiger lies ready for the jump; his eyes sparkle eager for murder; impatiently he whips his tail, and the sinews of his clutches are drawn tight. Self-defense causes the cry: 'To arms! To arms!' If you do not defend yourselves you will be torn to pieces and ground by the animal's teeth." [82]

It should be noted, that under an Illinois statute, accessories before the fact are regarded as principals and may so be punished. The person, "who not being present aiding, abetting or assisting, * * * advised, encouraged, aided or abetted the perpetration of a crime" is regarded as a principal. In the instance of this case, Spies, for example, through his newspaper aided, abetted, and encouraged the riot which resulted in the murder of seven policemen and the injury of sixty others.

The court in rendering its opinion noted that when persons enter into a combination determined to resist all opposition and when in the execution of this design a murder is committed, all the principals in the conspiracy are equally guilty. It was pointed out that one who enters a conspiracy to do an unlawful act such as might well result in murder is presumed to have understood the consequences which might reasonably be expected to flow from the execution of the act itself.

If men combine as conspirators, according to the opinion in this case, for the purpose of unlawfully overthrowing government and established law, and seek by means of print and speech to incite riot and murder, such conspirators who advised violence will be held responsible.[83] Those who inflame men's minds are responsible for the wrong that arises as a result of corrupt intentions, whether such inflammatory words are oral or published in the press.

The several states in endeavoring to combat such radical groups as the I. W. W. enacted criminal anarchy or syndicalism acts under which there were numerous prosecutions. These acts aimed to punish those who advocated terrorism or insurrection for the purpose of overthrowing the lawfully established governments of the states or Federal government.

[81] Ibid., 122 Ill. 197, 12 N.E. 961 (1887).

[82] Ibid., 122 Ill. 198, 12 N.E. 961 (1887).

[83] Ibid. See 122 Ill. 3, 198, 224, 226, 12 N.E. 866, 961, 973, 974 (1887).

Convictions were upheld in the United States Supreme Court in the following cases: Fox v. Washington,[84] Gilbert v. Minnesota,[85] Gitlow v. New York,[86] Whitney v. California,[87] and Burns v. U. S.[88] The state statutes upon which prosecution was made in the following cases were held either unconstitutional, or unconstitutional as applied: Fiske v. Kansas,[89] Stromberg v. California,[90] De Jonge v. Oregon,[91] and Herndon v. Lowry.[92]

The basis of the unconstitutionality in the cases that came before the United States Supreme Court was a violation of the Fourteenth Amendment to the United States Constitution on the ground that due process of law was denied, and that the state statutes were too vague and indefinite and set up no standard of guilt.

Prosecution in the Gitlow case was made under the following statute:

> Section 160—Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.
>
> Section 161—Advocacy of criminal anarchy. Any person who:
>
> 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or
>
> 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising of teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means * * * is guilty of a felony and punishable by imprisonment or fine or both.

[84] 236 U.S. 273, 35 S.Ct. 383, 59 L. Ed. 573 (1915).

[85] 254 U.S. 325, 41 S.Ct. 125, 65 L. Ed. 287 (1920).

[86] 268 U.S. 652, 45 S.Ct. 625, 69 L. Ed. 1138 (1925).

[87] 274 U.S. 357, 47 S.Ct. 641, 71 L. Ed. 1095 (1927).

[88] 274 U.S. 328, 47 S.Ct. 650, 71 L. Ed. 1077 (1927).

[89] 274 U.S. 380, 47 S.Ct. 655, 71 L. Ed. 1108 (1927).

[90] 283 U.S. 359, 51 S.Ct. 532, 75 L. Ed. 1117, 73 A.L.R. 1484 (1931).

[91] 299 U.S. 353, 57 S.Ct. 255, 81 L. Ed. 278 (1937).

[92] 301 U.S. 242, 57 S.Ct. 732, 81 L. Ed. 1066 (1937).

Under this New York penal statute Benjamin Gitlow was indicted, tried, and found guilty. When the case finally reached the United States Supreme Court on writ of error the only question considered was whether the New York statute in question deprived him of his liberty of expression in violation of the due process clause of the Fourteenth Amendment. In upholding the constitutionality of the statute, the court stated:

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the constitution, does not confer an absolute right to speak or publish without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.[93]

In a strong dissenting opinion Justice Holmes, with Justice Brandeis concurring, maintained that the defendant should not have been found guilty inasmuch as there had been no serious threat to the government of the United States, that is, no likely immediate fruition of any suggested attempt to overthrow the established order.

The validity of the California statute was questioned in Whitney v. California[94] on the ground that such laws deny equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States in upholding the validity of the California syndicalism law, asserted that such a law did not deny equal protection to those who resort to violent and unlawful means as against those who merely *advocate* such means.

§ 15. SEDITION AND ESPIONAGE

Publications injuring the national defense for the possible benefit of an enemy are punishable under the Espionage Act and its amendment.

Control of seditious publications early became a problem for the young nation. The Federalist party, during the administration of President Adams, passed the several acts for the purpose of stopping scandalous attacks by newspaper writers and pamphleteers. The Alien Act, passed June 25, 1798, gave the president

[93] Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 630, 69 L.Ed. 1138 (1925).

[94] 274 U.S. 357, 47 S.Ct. 641, 71 L. Ed. 1095 (1927).

authority to deport foreigners who might be regarded as engaged in treasonable machinations and provided that foreigners found without a license to reside here should upon conviction be imprisoned for three years and be declared ineligible for citizenship.

Almost immediately thereafter the Sedition Act of 1798 was passed to prevent unlawful conspiracies or sedition against the government.[95]

The effect of the Sedition Act was detrimental to the Federalist party which within a short time lost control of the government to the Democratic-Republican party of Jefferson. Expiration of the act in 1801 ended all efforts at a national sedition law until the World War of 1917.

Two provisions of the Sedition Act merit special attention. The first is that truth was made a defense, and second, that the jury was to determine both the law and the fact, under direction of the court. Both of these points were contentions of the defense in the Peter Zenger trial more than sixty years before.

During the Civil War there was no sedition law, but frequent difficulties arose because of the work of energetic war correspondents. In 1861 General McClellan conferred with correspondents relative to a better handling of war news. Complaints were registered that news dispatches revealed troop movements to the detriment of the Union cause; finally a censor was installed in Washington to watch news dispatches and to suppress any communication which he considered harmful to the North. At times false reports were purposely circulated to deceive Confederate generals, but so much dissatisfaction was caused that a plan was effected for an official representative of the press as a contact between the government and the newspapers. Despite some delays in the practical operation of the plan, the change in the government's policy was generally satisfactory.[96]

When the Union forces in the Civil War took over Confederate territory, the Northern generals suppressed several papers on the ground of treason. In New Orleans, for example, the *Bee,* the *Crescent,* and the *Delta* were suppressed. When the *Daily Argus* of Memphis was suppressed, for the publication of a fake message, General Wallace placed the paper under the supervision of correspondents of the *New York Tribune* and the *New York Times.* General Grant demanded either the resignation of an

[95] 1 Stat. 596 (1798).

[96] Lee, J. M., History of American Journalism, pp. 288–292.

editorial writer on the *Avalanche* of Memphis, or the total suspension of the publication; the editorial writer resigned but later for other reasons the *Avalanche* suspended operations until the close of the war.[97]

Northern newspapers were not without their difficulties with the government. The *Chicago Times* was suppressed on June 1, 1863, for its criticism of the government.[98] In New York, the *World* and the *Journal of Commerce* were suppressed on May 18, 1864, for several days by General John A. Dix under orders from Washington, guards were thrown around their offices, and their editors imprisoned. The cause of the difficulty so far as the *World* and *Journal of Commerce* were concerned was the innocent publication of a false presidential proclamation regarding the draft of 400,000 men.[99]

Within a few days the suspension of both the *World* and the *Journal of Commerce* was lifted and their editors released. The government realized that it had committed a political blunder.

The surge of patriotism incidental to World War I brought forth the Espionage Act of 1917, which was followed by an amendment the next year. This act and its amendment specified the following offenses:

(a) Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies,

(b) and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States,

(c) or shall willfully obstruct the recruiting or enlistment service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.[100]

On May 16, 1918, the Espionage Act was amended, making the following additional offenses:

[97] Ibid., 289, 290.

[98] McLaughlin, A. C., Constitutional History of the United States, p. 627.

[99] Mott, F. L., American Journalism, p. 351; Hudson, Frederic, Journalism in the United States, pp. 373, 670; Payne, G. H., History of Journalism in the United States, p. 322.

[100] 40 Stat. 217 (1917), 50 U.S.C.A. §§ 31–38.

(d) whoever shall say or do anything except by way of bona fide and not disloyal advice, to obstruct the sales of bonds or other securities by the United States, or the making of loans by the United States,

(e) shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States,

(f) the Constitution of the United States,

(g) the military or naval forces of the United States,

(h) the flag of the United States,

(i) the uniform of the army or the navy of the United States, or any language intended to bring the foregoing into contempt, scorn, contumely, or disrepute,

(j) or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies,

(k) or advocate any curtailment of production essential to the prosecution of the war,

(l) or shall teach, advocate or defend any of these acts,

(m) or whoever shall by word or act support or favor the cause of any country with which the United States is at war, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years or both.[101]

The Espionage Act and its Amendment have been upheld by the United States Supreme Court. In the Schenck case[102] for example, the principle upon which such a prosecution rests was well stated by Justice Holmes. Schenck and Baer were indicted under the provisions of the Espionage Act of 1917 for attempting to cause insubordination in the naval and military forces of the United States then at war with Germany. The overt offense consisted in preparing and circulating a document which intimated that conscription was despotism in its worst form and urged opposition to the draft. The defendants were found guilty in the lower court and the judgments were affirmed by the United States Supreme Court. The opinion stated:

> The character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire

[101] The 1918 Amendment was repealed by the Act of March 3, 1921.

[102] Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.[103]

Convictions under the Espionage Act were also sustained by the Supreme Court in Frohwerk v. United States,[104] Debs v. United States,[105] and Abrams v. United States.[106] In the Abrams case, Justice Holmes filed a strong dissent against the breadth of the decision. Justice Brandeis joined Justice Holmes in the dissent in the Abrams case, as well as in the convictions in two others, under both of which convictions were sustained on violations of the Espionage Act, Pierce v. United States [107] and a group of cases tried as one, Schaefer v. United States,[108] in the latter of which conviction of two defendants was reversed and the conviction of three defendants affirmed.

Justice Holmes delivered the opinions in the Schenck, Frohwerk, and Debs cases, giving in part the juridical foundation for limitations of expression.

In a dissenting opinion in Abrams v. U. S.[109] Justice Holmes stated: "It is only the present danger of immediate evil or an

[103] 249 U.S. 47, 52, 39 S.Ct. 249, 63 L.Ed. 470 (1919).

[104] 249 U.S. 204, 39 S.Ct. 249, 63 L. Ed. 561 (1919).

[105] 249 U.S. 211, 39 S.Ct. 252, 63 L. Ed. 566 (1919).

[106] 250 U.S. 616, 40 S.Ct. 17, 63 L. Ed. 1173 (1919).

[107] 252 U.S. 239, 40 S.Ct. 205, 64 L.Ed. 542 (1920).

[108] 251 U.S. 466, 40 S.Ct. 259, 64 L. Ed. 360 (1920).

[109] 250 U.S. 616, 628, 40 S.Ct. 21, 63 L.Ed. 1173 (1919).

intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."

Under power granted by the Espionage Act of 1917, the Postmaster General has authority to deny second-class mailing privileges to publications found by his department violating this war legislation. The *Milwaukee Leader,* edited by Victor Berger, was denied use of the mails, and its publisher, the Milwaukee Social Democratic Publishing Co., sought by mandamus proceeding against A. S. Burleson, the Postmaster General of the United States to force Burleson to re-admit the paper to the mails.[110] The *Leader* denounced the draft law as unconstitutional, arbitrary, and oppressive; the implication was clearly that the draft law should not be obeyed; no one, however, was directly urged to resist the draft; the food control regulation was damned as "Kaisering America." Berger was responsible for five editorials which were held as overt acts in a conspiracy under the Espionage Act, and was convicted and sentenced to twenty years imprisonment, but later this conviction was reversed by the United States Supreme Court on the ground that Judge Landis was prejudiced and that he had no right under the law to preside at the trial.[111]

In the case of the denial of privilege to the *Leader,* Justice Clarke, upholding the action of the Postmaster General, stated:

> These publications were not designed to secure amendment or repeal of the laws denounced in them as arbitrary and oppressive, but to create hostility to, and to encourage violation of them.[112]

The *Masses,* a socialistic publication, was denied the second-class privilege on the ground of violation of the Espionage Act of 1917. This publication obtained a preliminary injunction to prevent further denial of the use of the mails but the circuit court of appeals reversed the decision.

The court in reversing the trial court's granting of an injunction against Patten, postmaster of the City of New York stated:

[110] U. S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704 (1921).

[111] Berger v. U. S., 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921).

[112] U. S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704 (1921).

> If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the person addressed in resistance is not suggested. * * * To obstruct the recruiting or enlistment service, within the meaning of the statute, it is not necessary that there should be a physical obstruction.[113]

In Jeffersonian Pub. Co. v. West,[114] the plaintiff's publication was denied use of the second-class mail privilege; among the offensive articles used by this publication were the following:

> Men conscripted to go to Europe are virtually condemned to death and everybody knows it.
>
> Are we—like the sow returning to her wallow, and the dog to his vomit—to go back to the medievalism of personal rule —a Pope's word ruling the church, and a king's word ruling the state?
>
> Why not call Woodrow Wilson by the name of King, Kaiser, or Czar, if the Constitution is to be treated as the Kaiser treated the Belgium treaty?
>
> The Kaiser did not swear to support the Belgium treaty. Woodrow Wilson did swear to support the Constitution.
>
> And now, within six months after taking that solemn and public oath, the Congressmen and President, who did so, are treating the Constitution exactly as the Kaiser treated the Belgium treaty.

The *New York Call,* Socialist newspaper, was denied second-class mail privileges, and suit was instituted against Postmaster General Burleson to compel through writ of mandamus restoration of the privilege. In the trial court the writ was granted, but this decision was reversed by the United States Circuit Court of Appeals.[115]

In the litigation concerning denial of second-class mail privileges to publications for violations of the Espionage Act, it was held that under the law the Postmaster General could deny the privilege, but that he could not give blanket orders to hold a publication from the mails indefinitely[116] and that a governmental

[113] Masses Pub. Co. v. Patten, 246 F. 24, 38, L.R.A.1918C, 79, Ann.Cas. 1918B, 999 (C.C.A.N.Y.1917).

[114] 245 F. 585 (D.C.Ga.1917).

[115] Burleson v. U. S. ex rel. Workingmen's Co-op. Pub. Ass'n, 274 F. 749, 51 App.D.C. 65 (1921); U. S. ex rel. Workingmen's Co-operative Pub. Ass'n v. Postmaster General, 260 U. S. 757, 43 S.Ct. 246, 67 L.Ed. 499 (1923).

[116] U. S. ex rel. Milwaukee Social Democrat Pub. Co. v. Burleson, 258 F. 282, 49 App.D.C. 26 (1919).

department head in a decision involving judgment and discretion and coming within his range of authority would not be overruled by the courts unless it was shown that such official was clearly wrong.[117]

In the *Milwaukee Leader* case, Postmaster General Burleson continued to refuse second-class mail privileges, but he justified his position on the ground that under the Mail Classification Act of 1879 [118] mail matter is classified into four divisions. The second-class rate, Burleson asserted, could be given only to publications which met the requirements of that classification; by being out of the mails for a period, a publication could not claim that it was issued at regular intervals; the Postmaster General could easily find that a publication such as the *Milwaukee Leader* continued to carry information of the same seditious character as justified his original refusal of the second-class privilege.

THE 1940 AMENDMENT TO THE ESPIONAGE ACT

A war torn Europe saw the United States officially at peace in 1940, though political and military leaders were apprehensive. Would the United States be drawn into the conflict? What would be the effect of foreign agents and their possible subversive activity upon American security? Such questions raised doubt, stepped up preparedness, and resulted in laws to guard against espionage, sabotage, and trading with an enemy.

The Espionage Act of 1917 [119] remained in force, but its 1918 Amendment [120] had been repealed in 1921.[121] An amendment to the Espionage Act was passed March 28, 1940,[122] increasing the penalties provided in the Espionage Act of 1917.

[117] Ibid.

[118] 20 Stat. § 7, p. 358.

[119] 40 Stat. 217 (1917), 50 U.S.C.A. §§ 31–38. What is herein referred to as the Espionage Act of 1917 is the first section, Title 1, of an act "to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes."

[120] 40 Stat. 553 (1918) amending section three, title one; for U.S.C.A. reference see historical note following 50 U.S.C.A. § 33.

[121] 41 Stat. 1359, 1360 (1921), 50 U.S.C.A. § 33 (1928) reviving and restoring section three as originally enacted in 1917.

[122] 54 Stat. 79, §§ 1, 2 (1940), 50 U.S.C.A. §§ 31, 35.

THE ALIEN REGISTRATION ACT

With a safe-sounding title, the Alien Registration Act[123] was passed June 28, 1940. While its seeming purpose was to require registration of foreigners, its first four sections under Title 1 were in fact another sedition law, not dissimilar to the 1918 Amendment to the Espionage Act of 1917. These provisions, in the main, provide that it is unlawful:

1. to interfere or impair the loyalty, morale, or discipline of the naval or military forces of the United States.

2. to advise, counsel, urge or cause insubordination, disloyalty, or refusal of duty by any member of naval or military forces of the United States.

3. to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty of any member of the naval or military forces of the United States.

4. to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

5. with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter, advocating, advising, or teaching the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence.

6. to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purpose thereof.

WHAT IS TOO FREE EXPRESSION IN WAR TIME?

Dangers to which the press is subjected during time of war, as well as limitations on too free expression on the part of individuals, are illustrated by the grand jury investigation of the *Chicago Tribune* on the charge of espionage, and by summary prosecutions of too expressive individuals as reported in the press.

[123] 54 Stat. 670 (1940), 18 U.S.C.A. §§ 9–13 and 8 U.S.C.A. §§ 137, 155, 156a, 451–460.

The *Chicago Tribune* in 1942 was charged with violation of the Espionage Act, as amended in 1940, for giving confidential information on the strength and composition of the Japanese fleet as it approached Midway Island. This story attributed to "reliable sources in naval intelligence" revealed the strength and composition of the Japanese fleet as it approached Midway Island, and intimated that the United States Navy had advance information relative to the Japanese force. A Federal grand jury in Chicago, after thorough investigation, voted that no indictment should be returned against the *Tribune* or any other newspapers "because of the great public interest involved concerning the story that the U. S. Navy had advance knowledge of the strength of the Jap fleet." [124]

Seditious remarks, particularly during time of war, may be punished on the basis of various charges, such as disorderly conduct or disturbing the peace. In many such cases, the defendant is tried under summary procedure, and if the plea is "guilty," is fined or sentenced immediately. In such cases there is no appeal.

Shortly after the beginning of World War II a young man in Chicago was fined $200, for booing at President Roosevelt when the President's picture was thrown on the screen of a motion picture theater.[125] Two men were fined $25 each in a Milwaukee court for making unpatriotic remarks. One of these men was arrested at a bus station where a fight occurred after he made the following remark:

> Don't say anything bad about Hitler, because he is a very fine fellow, and some day he is going to do you a lot of good.[126]

The other man fined at the same time inquired the name of a sailor whose picture was hanging on the wall. When the proprietor of the tavern told the man that the picture was that of her son in the United States Navy, he replied:

> Hitler will get him, too. He took Greece, one, two, three; he took Norway, one, two, three, and he'll do the same for the United States.

[124] Editor & Publisher, Aug. 22, 1942, pp. 3, 29.

[125] News story, Chicago Sun, Dec. 16, 1941.

[126] News story about arrests as reported under Milwaukee date line in the Chicago Tribune, April 25, 1943.

WHEN THE STATE MAY ACT

Attempts to hamper the Federal government in the prosecution of a war constitutes an offense against government and may be punished by a state government. The State of Minnesota prosecuted one Joseph Gilbert in 1920 under its statute making it unlawful to interfere with or discourage the enlistment of men in either the military or naval service of the United States or any state. The judgment was affirmed in the Minnesota Supreme Court [127] and in the United States Supreme Court.[128] Gilbert was fined $500 and costs and sentenced to serve one year in the county jail. Gilbert was charged with saying:

> We are going over to Europe to make the world safe for democracy but I tell you we had better make America safe for democracy first. You say, what is the matter with our democracy? I tell you what is the matter with it: Have you had anything to say as to who should be President? Have you had anything to say as to who should be Governor of this state? Have you had anything to say as to whether we should go into this war? You know you have not. If this is such a good democracy, for Heaven's sake why should we not vote on conscription of men? We were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours.

The contention was made that inasmuch as the Federal government possesses the exclusive right to make war the state could not prosecute, but the court maintained that a state as part of the nation could prosecute; further, that freedom of speech and freedom of the press though natural and inherent rights are not absolute but are subject to restriction.

In State v. Freerks,[129] George W. Freerks was indicted for a speech in which he stated:

> The war is managed just the same as they are doing with these old hens. They get them to knit socks and sweaters to try to make them believe we are at war. No soldier ever sees these socks. What good are all these damned sweaters? It is all bunk.

Upon trial of the defendant, the trial court overruled the defendant's demurrer, a ruling which was affirmed by the Minne-

[127] 141 Minn. 263, 169 N.W. 790 (1918).

[128] 245 U.S. 325, 41 S.Ct. 125, 65 L. Ed. 287 (1920).

[129] 140 Minn. 349, 168 N.W. 23 (1918).

sota Supreme Court. The conclusion drawn was that Freerks' remarks might be taken to mean that the United States would profit nothing by the war and that it was futile to attempt to help the cause.

ELEMENTS OF TREASON

Although treason has had various interpretations in English government, the United States Constitution leaves no doubt about what acts may be classed as treasonable. No acts other than those specified in the Constitution may be declared as treason, as Congress has no power either to change or define this crime. The only power of that body in relation to the crime of treason is to prescribe the punishment.[130]

As defined in Article 3, Section 3, of the United States Constitution, treason consists only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort, and provides that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

A conspiracy to levy war against the United States, a conspiracy which might involve written words, would not constitute treason. The actual levying of war and a conspiracy to do so are two distinct offenses. War must actually be levied against the United States to constitute treason. The second definition of treason, that is, adhering to the enemies of the United States, giving them aid and comfort, might conceivably embrace the publication of flagitious material, especially in so far as the publication of material with the intent to aid the enemy is concerned. However, the publication of material advocating resistance to lawful authority would be in the nature of sedition rather than treason. Constructive treason which in English government once was a threat to the freedom of the press does not exist in the United States.

§ 16. TAXES ON THE PRESS

Stamp taxes on newspapers and advertisements, both in England and America, proved obnoxious to dissemination of knowledge; the Louisiana tax on newspaper receipts declared unconstitutional.

Taxation of the press so as to limit its opportunity for expression and circulation has been a serious problem back to the

[130] Art. 3, Sec. 3, cl. 2, U.S.Constitution.

time of Queen Anne, when Parliament in 1711 passed an act which included taxes on paper, pamphlets or newspapers, and even on advertisements. This act went into effect in 1712 and subject to some changes continued until the middle of the nineteenth century. The Stamp taxes were especially obnoxious and were accountable to a large degree for the difficulties between Great Britain and the American Colonies, one difficulty resulting in the separation of the Colonies from England.

The following provisions from the Stamp Act, passed in 1711, serve as an impressive illustration of the government's attempt to control the press:

> CI. And be it enacted by the authority aforesaid, That there shall be raised, levied, collected and paid, to and for the use of her Majesty, her heirs and successors, for and upon all books and papers commonly called pamphlets, and for and upon all news papers, or papers containing publick news, intelligence or occurrences, which shall, at any time or times within or during the term last mentioned, be printed in *Great Britain*, to be dispersed and made publick, and for and upon such advertisements as are herein mentioned, the respective duties following; that is to say,
>
> For every such pamphlet or paper contained in half a sheet or any lesser piece of paper, so printed, the sum of one half-penny sterling.
>
> For every such pamphlet or paper (being larger than half a sheet, and not exceeding one whole sheet) so printed, a duty after the rate of one penny sterling for every printed copy thereof.
>
> And for every such pamphlet or paper, being larger than one whole sheet, and not exceeding six sheets in octavo, or in a lesser page, or not exceeding twelve sheets in quarto, or twenty sheets in folio, so printed, a duty after the rate of two shillings sterling for every sheet of any kind of paper which shall be contained in one printed copy thereof.
>
> And for every advertisement to be contained in the London *Gazette*, or any other printed paper, such paper being dispersed or made publick weekly, or oftener, the sum of twelve pence sterling.[131]

The obnoxious taxes on advertisements, newspapers, and paper were abolished or repealed in England in 1853, 1855, and 1861 respectively, thus ending the so-called taxes on knowledge that in fact prevented the large circulation of newspapers. Since being freed from this form of restriction, there have arisen the

[131] 10 Anne c. 19 (1711), pp. 369, 370, in effect June 10, 1712.

great national dailies with headquarters in London, such as the *Times, Telegraph, Mail, Express, Herald,* and *News-Chronicle.*

The press as a business institution is subject to normal, general taxation, but when the power to tax is used as a restrictive measure on the freedom of the press, such taxation is clearly unconstitutional. In McCulloch v. Maryland,[132] Chief Justice Marshall stated that the power to tax involves the power to destroy. Concerning this power Justice Holmes commented in a much later case to the effect that "The power to tax is not the power to destroy while this court sits." [133]

In Colonial America, there were stamp taxes, but any particular stamp tax law was short lived. Massachusetts passed the first colonial stamp tax on newspapers in 1755, with New York following with a similar tax which was in effect from 1756 to 1760. In 1765 Parliament passed the English Stamp Act applicable to colonial newspapers. Such a storm of protest arose in the colonies through both the press and special pamphlets that Parliament repealed the Stamp Act on newspapers in 1766. In their successful fight against the Stamp tax on newspapers the colonists learned the power of protest through effective organization which served them so well a few years later.

In 1785 Massachusetts passed its second stamp tax on newspapers; this was not for the purpose of checking public opinion and restricting newspapers but principally for revenue; the protest was so great however against a type of tax that had proved so ill advised that the tax was repealed the following year. Massachusetts also passed a tax on advertisements amounting to six pence for each insertion, only to have this tax later repealed.

While there have been numerous suggestions to tax newspapers and advertising, other than the general property, personal property, and income taxes applicable to all individuals and corporations, no more vicious attempt to hobble the press has been attempted than the Louisiana statute, passed in 1934, for the purpose of exacting 2 per cent of the gross receipts of all newspapers, magazines, and periodicals engaged in the business of selling advertisements, when such publications enjoyed a circulation above 20,000 copies per week.[134]

[132] 4 Wheat. 316, 4 L.Ed. 579 (1819).

[133] Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 223, 48 S. Ct. 451, 453, 72 L.Ed. 857, 56 A.L.R. 583 (1928).

[134] Louisiana Act No. 23 of 1934—

The validity of this statute came before the United States Supreme Court in Grosjean v. American Press Co.[135] in which it was held that this tax on the press was a violation of the Fourteenth Amendment of the Constitution. The court pointed out that the tax was not measured by the volume of advertising linage carried but rather on the extent of circulation, thus penalizing the publishers of newspapers of a definite class.

In declaring this statute unconstitutional, the court stated:

> * * * The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.
>
> In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our national existence has undertaken to impose a tax like that now in question.
>
> The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.[136]

This threat to freedom of the press thus was stopped by this decision; a legal keystone was established in embracing the right of circulation within the constitutional concept of press liberty.

"That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited, by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent (2%) of the gross receipts of such business."

[135] 297 U.S. 233, 56 S.Ct. 444, 80 L. Ed. 660 (1936).

[136] 297 U.S. 233, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936).

CHAPTER 3

FREEDOM OF THE PRESS

Sec.
17. Liberty of the Press a Qualified Right.
18. Nature of the Right.
19. The Constitutional Guaranties.
20. Meaning of Press Guaranty Broadened.
21. Economic Limitations.

§ 17. LIBERTY OF THE PRESS A QUALIFIED RIGHT

In the first instance only, may one publish whatever he pleases.

Liberty may be defined as the right to use one's faculties; this liberty includes the natural right of self-expression, which we may take as the liberty to communicate (speak and write). The right of self-expression, originally what may be termed a natural right, has become a civil right, or a right guaranteed or established by government.

Whether the right of self-expression is a natural right, however, may be questioned; the question is juridical, not necessarily important for the purposes of this study. It is submitted that there are certain primordial laws of nature, which might be given as follows: self-preservation, reproduction, spirituality, reason, and association. The right of association implies communication or expression. An infant cries when hungry or injured; it is a natural characteristic of the young child, or the child's self-expression. Added years bring the ability of the mind to recognize and identify.

The primitive man could express displeasure or satisfaction; thus was born the idea known as the natural law of self-expression. Although Bury [1] doubts that freedom of speech can be established as a natural right, it clearly might be classified as a primitive law of nature. At first, the law of self-expression was confined to elemental vocal sounds and physical acts. With the coming of writing and printing, the right of self-expression was correspondingly enlarged. There is, of course, recognition of the fact that any natural law of self-expression may be modi-

[1] Bury, J. B., History of Freedom of Thought, p. 13.

fied by society and so placed under limitations through law and custom. Civil law recognizes natural law, as well as the right to modify or curb certain instincts and natural laws.

One may have the capacity to write and publish what he pleases in so far as either the Federal and the several state governments are concerned, but these governments provide the machinery for legal redress either by the respective governments or by individuals who may be injured through unwarranted exercise of this liberty.

The constitutional freedom guaranteed to the people to print and publish may be said to give the "right" to commit libel, in the first instance. While it is a generally accepted legal doctrine that the guaranty of liberty of the press is not a shield for malice, license, and defamatory statement when published with bad motives for unjustifiable ends,[2] there is ground for holding that in the first instance, the opposite is true, or that there is a constitutional right to print anything in the first instance, whether the statement is libelous or not.

If however one prints a libelous statement he subjects himself to the legal consequences of his act. Under this theory accountability begins at the time of publication. Clearly in the second instance, such a liberty has potential limitations. A civil or criminal action may be instituted to penalize one who has used his "unrestricted" liberty. Liberty of the press in the first instance may not withstand the test of its consequences in relation to either the government or to the individual.

On the theory that rights and duties are correlative, the thesis that there is a right to commit libel would not be sound.

Salmond in his work on *Jurisprudence* states: "For every duty must be a duty towards some person or persons, in whom therefore, a correlative right is vested. And conversely every right must be a right against some person or persons, upon whom, therefore, a correlative duty is imposed." [3]

Upon this theory, though the right of a free press is guaranteed, there is imposed upon others the duty of respecting that right; the one who has the right to write and publish what he pleases in turn has the duty to respect a like right in others.

[2] State v. McKee, 73 Conn. 18, 22, 46 A. 409, 49 L.R.A. 542, 84 Am.St. Rep. 124 (1900). "There is no constitutional right to publish every fact or statement that may be true." In the *final* analysis, this Connecticut court conclusion is correct.

[3] Salmond, Sir John, Jurisprudence (7th Ed.), p. 240.

If he offends others by misusing his right, he violates his duty to the like rights of others. A violation of the right would constitute a wrong. The right and the wrong are clearly not identical; therefore, how could one do a wrong which would be a right? Obviously, it would be logically impossible, upon any sound application of the right-duty theory.

Admittedly, however, as has been pointed out, there is in the first instance, the right to print what he pleases; one has the freedom and the opportunity to do so; if one prints a libelous statement, his action relates back to his original act and transcends what seemed at first to be a right into a wrong.

This so-called right to commit libel is more apparent than real; in fact, it is fictitious when viewed after the damaging publication has been made. Such an apparent right could only be real when the libel is considered chronologically at the time of the act of publishing. In other words, anyone may print anything he pleases in the first instance without license or previous censorship; the only restrictions are potential. After the publication is made and if damage is done offending any of the Federal or state statutes or injuring an individual in either his personal or property rights, the restrictions become operative. An obscene publication cannot be accorded second-class mail privileges; a libelous statement subjects its publisher to damages, and an infringement of copyright may bring injunctive relief to prevent further distribution as well as damages for violation of the property rights of another.

Libel is a peculiar civil injury or tort in this respect, for the liberty of printing what one pleases is guaranteed by the constitutional enactment. In contrast, there is no right to commit murder or any other felony. The liberty of the press is not license and it guarantees no immunity from damages or punishment when there is such use of this liberty that other rights are violated. Freedom of the press is not an absolute right; rather it is a qualified right, the exercise of which determines liability for its wrongful use.

Freedom of the press and freedom of radio are correlative; both are symbols of democratic thought. Yet there are marked differences in these two media of expression. No license is needed in order to start a newspaper, though postal regulations determine the conditions of distribution under second-class mail privileges. Subject to economic limitations, any person may found and operate a newspaper without government approval except for postal privileges for distribution of copies by mail;

yet anyone who meets the prescribed conditions and observes the laws of the country can obtain these postal privileges.

In the field of radio, however, no radio station can begin to function without authorization of the Federal Communications Commission; certain scientific limitations are manifest. The number of clear channels is limited; to prevent confusion limitations of power are necessary for successful broadcasting. In radio there is time limitation, which means that but one program can be broadcast on one wave band at one time; in the newspaper field, additional exposures of ideas to the public may be made through the addition of pages and editions.

The Communications Act of 1934 specifies that a radio station shall give equal opportunities to all legally qualified political candidates but there is no obligation imposed upon any licensee to allow the use of its station by any political candidate.[4] Section 326 of the Communications Act makes clear that the Federal Communications Commission has no power of censorship over radio communications. It is noted in this section however that obscene, indecent, or profane language is prohibited in radio communication.

Radio is subject to control under general censorship in time of war; it is likewise subject to the same limitations imposed upon newspapers in reference to defamation, privacy, contempt, and piracy of copyrighted materials. Under section 316 of the Communications Act radio stations are prohibited from broadcasting any advertisement or other information concerning lotteries or chance enterprises.

§ 18. NATURE OF THE RIGHT

In the broadest sense freedom of the press means no previous censorship, no prosecutions for free expression other than on widely accepted principles of the accepted general law, and no interference with lawful distribution.

Arising out of the common law and the Federal and state guaranties of freedom of the press, a right of liberty to prepare and publish has been created. This right embraces a bundle of lesser rights; or the right guaranteed by the constitutions may be disintegrated into certain derivative rights, as for example, the right to gather news, the right to print the news, and the

[4] Communications Act of 1934, Sec. 315, 47 U.S.C.A. § 315.

right to comment. All these derivative rights arise from the common law which the United States inherited from England and from the respective Bills of Rights of the national government and of the several states.[5]

According to Salmond, a right is an interest the violation of which is a wrong.[6] A right implies a correlative duty. In the case of freedom of the press there is the duty not to abuse the right. The relationships arising from a right may be enumerated as follows:

1. A right implies possession subject to defeat if the right is abused.
2. A right exists in an individual as against others.
3. A right gives liberty of action or omission.

These relationships growing out of a right apply fully to liberty of the press. An individual under the guaranty of the several constitutions possesses the right, which exists *in rem,* or against others; it gives freedom of action or expression or the freedom of silence. A newspaper may comment, for example, on a public event or not as it may please.

Sir William Blackstone, in his Commentaries published in 1765–1769, recognized the need of freedom of the press in government, a need later discussed by eminent statesmen of the English-speaking world. Likewise Blackstone recognized the responsibility upon the part of the press for the abuse of the right. "The liberty of the press," noted Blackstone, "is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the

[5] As pointed out by Zechariah Chafee, Jr., the legal meaning of freedom of the press cannot be determined properly without a knowledge of the political and philosophical bases of such freedom. He mentions four writings as invaluable for the study of this subject, as follows: Plato's Apology of Socrates; John Milton's Areopagitica; the second chapter of John Stuart Mill's essay, On Liberty; and Walter Bagehot's essay, The Metaphysical Basis of Toleration; Zechariah Chafee, Jr., Freedom of Speech, p. 377.

See also: Paterson, James, Liberty of Press, Speech, and Public Worship; Siebert, F. S., The Rights and Privileges of the Press; Postgate, R. W., That Devil Wilkes; Bleackley, Horace, Life of John Wilkes; Bleyer, W. G., The History of American Journalism; Patterson, Giles J., Free Speech and a Free Press; and Chafee, Zechariah, Jr., Free Speech in the United States.

[6] Salmond, Sir John, Jurisprudence (7th Ed.), p. 237ff.

public; to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." [7]

The position taken by Blackstone is subject to negative criticism, for the liberty of the press might be hollow indeed if previous restraints were forbidden, only later to have punishments inflicted upon those who publish innocent or even worth-while publications.

In his scholarly study of limitations on constitutional rights, the late Judge T. M. Cooley stated:

> But while we concede that liberty of speech and of the press does not imply complete exemption from responsibility for everything a citizen may say or publish, and complete immunity to ruin the reputation or business of others so far as falsehood and detraction may be able to accomplish that end, it is nevertheless believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications. * * * The constitutional liberty of speech and of the press, as we understand it, implies the right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation or pecuniary interests of individuals.[8]

The right to publish without previous restraint has several *apparent* exceptions, for example, postal regulations, equitable relief against conspiracy, boycott, and unfair competition, espionage acts restraining news publication about preparations for war, troop movements, and combat. These regulations amounting to restriction may be said to be more apparent than real. Postal regulations refusing the use of the mails for obscene or indecent publications, or articles of a character to incite arson, murder, or assassination are not restrictions against publication as such but rather against distribution through the mails.

The injunctive process in a boycott case, while a restriction against the use of words tending to incite or further the boycott,

[7] 4 Blackstone 151, 152.

[8] Cooley, T. M., 2 Constitutional Limitations (8th Ed.) pp. 885, 886.

is in actual effect a restriction against an act or series of acts, to which the use of spoken or written words is entirely incidental. The restriction is one against conduct. Examination of cases indicates that injunctions which may be thought at first to be limitations on the liberty of speech and liberty of the press, are rather advance limitations on slander of title of a patent, intimidation by using "unfair signs" to threaten employees or to cause them to join a strike movement, unlawful conspiracy, and unfair competition. The restriction on the press in such cases is purely incidental.

The espionage acts of course form a special case when the nation and its welfare are threatened; during such periods, naturally the rights of citizens are limited in the interest of a common cause. However, in equitable relief against boycott or in espionage cases, it is physically possible for any citizen to write and print whatever he may please; the freedom is present in the first instance to say and to write what one may please; the restriction is applied in the second instance, or in the nature of a penalty after the publication has taken place, except that in the case of postal regulations, where the nature of the particular publication is known, the use of the mails will be refused. Partial distribution may have taken place, but upon discovery of the illegal material, further distribution or publication will be denied the use of the mails.

What the First Amendment of the Constitution means should be determined in part at least upon what its authors intended this guaranty to mean. The colonists knew the struggles of the common people of England for a free press, and as well suffered the oppressive measures of English colonial governors. There is ample authority for believing that the authors of the First Amendment intended that the new nation would be protected against previous censorship and license and that the citizens of the new nation would not be unjustly prosecuted for their statements and opinions criticizing the new central or Federal government.[9] The political leaders responsible for the Constitution and its amendments realized that neither the English Petition of Right (1628) nor the English Bill of Rights (1689) mentioned freedom of discussion; the majority seemed to believe that the guaranty should be expressly stated and it was on the presumption that such provision would be made that some of the colonies at least ratified the Constitution itself. W. R.

[9] Vance, W. R., 2 Minnesota Law Review 239. 249 (1918).

Vance, noted legal scholar, holds that the constitutional guaranty was intended "not only to abolish forever previous censorship of publications by the government, but also to safeguard the citizen from any larger liability for his uncensored publication, or his public utterance, than was imposed by the rules of the common law as accepted at the time of the making of the Federal constitution." [10]

The nature of this right of freedom of the press is both affirmative and negative. It is affirmative in the first instance on the part of the individual so far as writing or publishing what he pleases; on the other hand, it is negative in that there will be no legal interference with the actual publication and distribution of news, feature articles, or editorials, or other literary or artistic material, except in special cases hereinafter mentioned.

The constitutional guaranty of freedom of the press does not prevent the courts from punishing contempts when publications interfere with the administration of justice. The power to punish for contempt is inherent in the courts, although serious doubt exists whether this inherent power to punish for out of court contempt is based on the common law.[11] Neither does the constitutional guaranty absolve the press from libel actions. Potential libel or contempt actions are indirect controls of the press. Further indirect controls exist in the potential liability for violations of privacy or infringement of copyright. There is also the hazard that second-class mail privileges may be changed. Likewise there is the potentiality that published opinion may be indirectly enjoined, when such publication is merely an incident in a restrictive action against threats to property rights when there is no full, complete, and adequate remedy at law.

The control of the press is not delegated to the legislature but is rather reserved to the people; if there is an abuse of the guaranty of freedom of the press, there exists the judicial machinery to weigh the application of penal and compensatory measures, as for example in the provision for legal measures and procedures to give damages if a libel is committed. Such regulations are clearly not previous restraints through legislative or administrative means; they are potential checks only.

Freedom of the press, in its modern and broadest concept, means prior to publication the absence of censorship, but following publication, no prosecution for free expression other than on

[10] Ibid., 255.

[11] Fox, Sir John C., Contempt of Court, p. 8.

widely accepted principles of the general law of the jurisdiction, and the guaranty of non-interference with lawful circulation; abuse of such freedom, by means of defamation, violation of privacy, in some jurisdictions, interference with the administration of justice, or the government in the prosecution of war, in any attempt to overthrow the government by violent and unlawful means, or non-conformance with post office or other administrative regulations, subjects the offending individual or organization to the potentiality of legal controls.

The courts of the several states recognize that the right of freedom of the press is both a guaranty of liberty and an allocation of responsibility. As stated by that eminent student of jurisprudence, Timothy Walker, "Civil liberty is liberty protected and restrained by law." [12] An early significant decision made in New York stated, "The liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals." [13]

"Liberty of the press," according to the case of Sweeney v. Baker,[14] "consists in a right, in the conductor of a newspaper, to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent, that anyone would be responsible for the publication."

Liberty of the press, according to the opinion in Commonwealth v. Blanding [15] "was intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers."

"The true liberty of the press," stated the opinion in Respublica v. Oswald,[16] "is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society, to inquire into the motives of such publications, and distinguish between those which are meant for use and reformation, and with an eye solely to the public good; and those which are intended merely to delude and defame. To the latter description

[12] Walker, Timothy, Introduction to American Law (11th Ed.), p. 211.

[13] Chancellor Kent in People v. Croswell, 3 Johns.Cases 336, 393.

[14] 13 W.Va. 158, 182, 31 Am.Rep. 737 (1878).

[15] 3 Pick. (Mass.) 304, 313, 15 Am. Dec. 214 (1825).

[16] 1 U.S. 319, 1 Dal. (Pa.) 319, 326, 1 L.Ed. 155, 1 Am.Dec. 246 (1788).

it is impossible that any good government should afford protection and immunity."

In Ex parte Harrison [17] the court in dismissing a prisoner under a habeas corpus proceeding held that "the constitutional liberty of speech and of the press grants the right to freely utter and publish whatever a citizen may desire and to be protected in so doing, provided always that such publications are not blasphemous, obscene, seditious, or scandalous in their character so that they become an offense against the public and by their malice and falsehood injuriously affect the character, reputation or pecuniary interest of individuals."

In People v. Most [18] in which Johann Most was convicted of seditious libel, the court in its opinion stated: "It (the constitution) places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation."

"In its broadest sense," stated the court in Cowan v. Fairbrother,[19] "freedom of the press includes not only exemption from censorship but security against laws enacted by the legislative department, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling opinion."

§ 19. THE CONSTITUTIONAL GUARANTIES

Both the Federal and state governments have secured for the people freedom of the press.

In the United States, freedom of the press finds its authority in the Federal Constitution, Amendment 1, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or *of the press;* or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The several states likewise make provision for freedom of the press. To illustrate the similarity of the various state constitu-

[17] 212 Mo. 88, 92, 110 S.W. 709, 16 L.R.A.,N.S., 950, 126 Am.St.Rep. 557, 15 Ann.Cas. 1 (1908).

[18] 171 N.Y. 423, 64 N.E. 175, cl. 58 L.R.A. 509 (1902).

[19] 118 N.C. 406, 418, 24 S.E. 212, 32 L.R.A. 829, 54 Am.St.Rep. 733 (1896).

tions relative to this subject, the several state constitutional provisions are given as follows:

ALABAMA: Art. 1, §§ 4 & 12.

Any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty. That in prosecutions for libel or for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; that in all indictments for libels, the jury shall have the right to determine the law and the facts under the direction of the court.

ARIZONA: Art. 2, § 6.

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

ARKANSAS: Art. 2, § 6.

The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and justifiable ends, the party charged shall be acquitted.

CALIFORNIA: Art. 1, § 9.

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. Indictments found, or information laid, for publications in newspapers shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause.

COLORADO: Art. 2, § 10.

No law shall be passed impairing the freedom of speech; every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for the abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

CONNECTICUT: Art. 1, §§ 6 & 7.

No law shall ever be passed to curtail or restrain the liberty of speech or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and the facts, under the direction of the court.

DELAWARE: Art. 1, § 5.

The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity, and any citizen may print on any such subject, being responsible for the abuse of that liberty. In prosecutions for publications, investigating the proceedings of officers, or where the matter published is for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury may determine the facts and the law, as in other cases.

FLORIDA: Declaration of Rights, § 13.

Every person may fully speak and write his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for libel the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libelous is true, and was published with good motives, the party shall be acquitted or exonerated.

GEORGIA: Art. 1, § 1, paragraph 15.

No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that liberty.

IDAHO: Art. 1, § 9.

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty.

ILLINOIS: Art. 2, § 4.

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.

INDIANA: Art. 1, §§ 9 & 10.

No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible. In all prosecutions for libel, the truth of the matters alleged to be libelous may be given in justification.

IOWA: Art. 1, § 7.

Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right.

No law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appear to the jury that the matter charged as libellous was true, and was published with good motives and for justifiable ends, the party shall be acquitted.

KANSAS: Bill of Rights, § 11.

The liberty of the press shall be inviolate; and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted.

KENTUCKY: Bill of Rights, §§ 8, 9.

Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write, and print on any subject, being responsible for the abuse of that liberty. In all prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

LOUISIANA: Art. 1, § 3.

No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

Art. 19, § 9.

In all proceedings or indictments for libel, the truth thereof may be given in evidence. The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge.—Constitution of 1921.

MAINE: Declaration of Rights, § 4.

Every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of that liberty; no laws shall be passed regulating or restraining the freedom of the press; and in prosecutions for any publication respecting the official conduct of men in public capacity, or the qualifications for those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence, and in all indictments for libels, the Jury,

after having received the direction of the Court, shall have a right to determine, at their discretion, the law and the fact.

MARYLAND: Declaration of Rights, Art. 40.

That the liberty of the press ought to be inviolably preserved; and that every citizen of the state ought to be allowed to speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

MASSACHUSETTS: Declaration of Rights, Art. 16.

The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this Commonwealth.

MICHIGAN: Art. 6, § 25.

In all prosecutions for libels the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true and was published with good motives and for justifiable ends, the party shall be acquitted. The jury shall have the right to determine the law and the fact.

MINNESOTA: Art. 1, § 3.

The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

MISSISSIPPI: Art. 3, § 13.

The freedom of speech and of the press shall be held sacred; and in all prosecutions for libel the truth may be given in evidence, and the jury shall determine the law and the facts, under the direction of the court; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted.

MISSOURI: Art. 2, § 14.

That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write, or publish whatever he will on every subject, being responsible for all abuse of that liberty; and that in all suits for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

MONTANA: Art. 3, § 10.

No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence; and the jury, under the direction of the court shall determine the law and the facts.

NEBRASKA: Art. 1, § 5.

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense.

NEVADA: Art. 1, § 9.

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for libels the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted or exonerated.

NEW HAMPSHIRE: Bill of Rights, Art. 22.

The liberty of the press is essential to the security of freedom in a State; it ought, therefore, to be inviolably preserved.

NEW JERSEY: Art. 1, § 5.

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

NEW MEXICO: Art. 2, § 17.

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted.

NEW YORK: Art. 1, § 8.

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

NORTH CAROLINA: Declaration of Rights, § 20.

The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same.

NORTH DAKOTA: Art. 1, § 9.

Every Man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege. In all civil and criminal trials for libel the truth may be given in evidence, and shall be a sufficient defense when the matter is published with good motives and for justifiable ends; and the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases.

OHIO: Art. 1, § 11.

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

OKLAHOMA: Art. 2, § 22.

Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecution for libel, the truth of the matter alleged to be libelous may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous be true, and was written or published with good motives and for justifiable ends, the party shall be acquitted.

OREGON: Art. 1, § 8.

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

PENNSYLVANIA: Art. 1, § 7.

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers

or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

RHODE ISLAND: Art. 1, § 20.

The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defense to the person charged.

SOUTH CAROLINA: Art. 1, §§ 4 & 21.

The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government or any department thereof for a redress of grievances.

In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and the facts.

SOUTH DAKOTA: Art. 6, § 5.

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right. In all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense. The jury shall have the right to determine the fact and the law under the direction of the court.

TENNESSEE: Art. 1, § 19.

That the printing presses shall be free to every person to examine the proceedings of the Legislature, or of any branch or officer of the Government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other criminal cases.

TEXAS: Art. 1, § 8.

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for

the publication of papers, investigating the official conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

UTAH: Art. 1, § 15.

No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

VERMONT: Declaration of Rights, chap. 1, art. 13.

That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.

VIRGINIA: Art. 1, § 12.

That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments; and any citizen may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right.

WASHINGTON: Art. 1, § 5.

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

WEST VIRGINIA: Art. 3, §§ 7 & 8.

No law abridging the freedom of speech, or of the press, shall be passed; but the Legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.

In prosecutions and civil suits for libel, the truth may be given in evidence; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the verdict shall be for the defendant.

WISCONSIN: Art. 1, § 3.

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions, or indictments for libel, the truth may be given in

evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine law and the fact.

WYOMING: Art. 1, § 20.

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right; and in all trials for libel, both civil and criminal, the truth when published with good intent and for justifiable ends, shall be sufficient defense, the jury having the right to determine the facts and the law, under the direction of the court.

The United States Constitution does not define freedom of the press, and so it remains for judicial interpretation in specific cases to determine what constitutes this right; a similar situation obtains as to the meaning of freedom of the press in the several states.

The First Amendment was interpreted in Patterson v. State of Colorado ex rel. Atty. Gen.[20] to mean that there shall be no previous restraints upon publications as had been practiced by other governments and that the guaranties of free speech and a free press do not prevent the subsequent punishment of such as may be thought contrary to the public welfare. This interpretation was later modified by Justice Holmes, in Schenck v. United States.[21]

The court further noted that in every case the question is "whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

The guaranty of the First Amendment clearly does not prevent the enforcement of the Espionage Act in time of war,[22] or contempt citations when publications clearly interfere with the administration of justice.[23] In Ex parte Jackson [24] it was held that regulations regarding the examination of printed matter in the

[20] 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879, 10 Ann.Cas. 689 (1907).

[21] 249 U.S. 47, 39 S.Ct. 247, 63 L. Ed. 470 (1919).

[22] Schenck v. U. S., 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919); Frohwerk v. U. S., 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561 (1919); Debs v. U. S., 249 U.S. 211, 39 S.Ct. 252, 63 L. Ed. 566 (1919); Abrams v. U. S., 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919).

[23] Toledo Newspaper Co. v. U. S., 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186 (1918).

[24] 96 U.S. 727, 24 L.Ed. 877 (1878).

mails cannot be enforced so as to interfere with freedom of the press.

Penal action for mailing a lottery advertisement has been held not to interfere with the amendment, for the reason that the circulation is not prohibited; the government merely declines to be an agent for the circulation of printed matter which might be injurious to the people.[25] Denial of second-class mailing privileges to publications denouncing certain war time laws as oppressive and creating hostility to such laws does not violate the guaranty of the First Amendment.[26]

An order of the National Labor Relations Board, restraining the Associated Press from interfering with the union activities of employees was held not to constitute an infringement of the guaranty of freedom of the press.[27] "The order of the Board," stated the court, "in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time—to discharge any editorial employee who fails to comply with the policies it may adopt."

It is submitted that the Fifth Amendment of the United States Constitution clearly likewise guarantees rights of the press, as against encroachment by the Federal Government. This amendment in part follows:

> nor shall any person—be deprived of life, liberty, or property, without due process of law.

With the Federal government, in its centralizing process attributable to changing conditions of transport and communication, becoming more active especially in interstate commerce, there might easily arise some Federal situation in which liberty or more particularly liberty of the press might be jeopardized. If such a situation did arise, there would seem no reason why the Fifth Amendment, in addition to the First Amendment, might not be invoked to protect the press.

[25] In re Rapier, 143 U.S. 110, 12 S. Ct. 374, 36 L.Ed. 93 (1892); Horner v. U. S., 143 U.S. 207, 12 S.Ct. 407, 36 L.Ed. 126 (1892); Horner v. U. S., 143 U.S. 570, 12 S.Ct. 522, 36 L. Ed. 266 (1892).

[26] U. S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704 (1892).

[27] Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1037).

The Fourteenth Amendment became effective July 28, 1868, as one of the Civil War Amendments. Although now a part of the Federal Constitution, this amendment applies to the several states, preventing them from depriving the citizens certain personal rights, among which for present purposes of this study the guaranty of freedom of the press is of paramount importance. Freedom of the press cannot be taken away from the citizens without due process of law. The text of Section 1 of this amendment follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The widening of the meaning of freedom of the press as interpreted by the Fourteenth Amendment marks a milestone in the development of democratic institutions.

The term "liberty" as used in the Fourteenth Amendment has been given a broad interpretation by the United States Supreme Court. This amendment was held as basic in the protection of liberty as of property in Coppage v. State of Kansas.[28]

Thus liberty means more than freedom from physical restraint. According to Allgeyer v. State of Louisiana,[29] Williams v. Fears,[30] and Booth v. People of State of Illinois,[31] liberty means the right of a person to use all his facilities. Opinions given in Gitlow v. People of State of New York,[32] Whitney v. People of State of California,[33] Fiske v. State of Kansas,[34] and Near v. State of Minnesota ex rel. Olson[35] held that freedom of speech and liberty of the press are liberties protected under the Fourteenth Amendment.

[28] 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441, L.R.A.1915C, 760 (1915).

[29] 165 U.S. 578, 17 S.Ct. 427, 41 L. Ed. 832 (1897).

[30] 179 U.S. 270, 21 S.Ct. 128, 45 L. Ed. 186 (1900).

[31] 184 U.S. 425, 22 S.Ct. 425, 46 L. Ed. 623 (1902).

[32] 268 U.S. 652, 45 S.Ct. 625, 69 L. Ed. 1138 (1925).

[33] 274 U.S. 357, 47 S.Ct. 641, 71 L. Ed. 1095 (1927).

[34] 274 U.S. 380, 47 S.Ct. 655, 71 L. Ed. 1108 (1927).

[35] 283 U.S. 697, 51 S.Ct. 625, 75 L. Ed. 1357 (1931).

Perhaps the most celebrated case relative to the rights of a newspaper to be published despite the previous declaration that it be a public nuisance is the Near case.

In the city of Minneapolis, H. A. Guilford and J. M. Near as co-partners began the publication of a newspaper known as the *Saturday Press*. This publication made attacks upon public officials. The complaint alleged that on several different dates the defendants published malicious, scandalous, and defamatory articles concerning certain persons including the mayor and the chief of police of Minneapolis, a special enforcement officer, the county attorney, as well as the Jewish race, the grand jury of Hennepin county, and others. The complaint was based upon Chapter 285, Session Laws of Minnesota, 1925, under the following provisions:

> Section 1. Publication of certain newspaper declared nuisance.—Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away,
>
> (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or
>
> (b) a malicious, scandalous and defamatory newspaper, magazine, or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

The defendants demurred to the complaint, but the demurrer was overruled and certified to the Supreme Court of the State of Minnesota upon constitutionality of the statute.

The supreme court of the state affirmed [36] the order of the district court and the case was remanded to the district court for further proceedings.

The action came before the district court on hearing with the result that the *Saturday Press* was declared a public nuisance, and in accordance with the statute, abated. Guilford did not appear to appeal this decision but Near, his partner, did so appeal. The state supreme court then affirmed the decision of the lower court [37] in face of the appellant's contention that the state statute violated not only the Minnesota Constitution guaranteeing freedom of the press but the Fourteenth Amendment to the United

[36] 174 Minn. 457, 219 N.W. 770, 58 A.L.R. 607 (1928).

[37] 179 Minn. 40, 228 N.W. 326 (1929).

States Constitution. The decision of the state supreme court was appealed to the United States Supreme Court on the ground that the state violated the Fourteenth Amendment, in denying liberty without due process of law; the Supreme Court of the United States in a memorable decision reversed the decision of the Minnesota Supreme Court.[38]

Chief Justice Hughes in his opinion emphasized the real danger involved, as follows:

> The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. * * * The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this court has said, on proof of truth.
>
> Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.[39]

Whatever the threatened encroachment to the liberty of the press the Fourteenth Amendment stands as a constitutional bulwark against state interference discriminatingly applied or unmindful of the full effect of the First Amendment of the United States Constitution.

RADIO CONTROL IN RELATION TO THE FIRST AMENDMENT

The guaranty of free speech, contained in the First Amendment, together with the guaranty of a free press, does not guarantee that anyone in the United States can obtain a radio license. "Freedom of utterance is abridged to many who wish to use the limited facilities of radio," declared Justice Frankfurter in

[38] 283 U.S. 697, 51 S.Ct. 625, 75 L. Ed. 1357 (1931).

[39] Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 721, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

National Broadcasting Co. v. U. S.[40] "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."

In this case, it was clearly pointed out that the right of free speech does not include the right to establish or maintain radio broadcasting facilities without a license. Denial of an application to establish a radio station on the ground of public interest, convenience, or necessity does not constitute a denial of free speech.

§ 20. MEANING OF PRESS GUARANTY BROADENED

Ordinances against distribution of circulars may be unconstitutional.

Various state supreme courts have acted upon the validity of handbill ordinances; when such ordinances are such exercise of police power that there is no interference with the guaranty of freedom of the press, these regulations have been upheld. Decisions by the United States Supreme Court from 1938 to 1943, however, definitely set limitations upon the extent to which such local municipal ordinances could be considered legal. It is likely therefore that some previous state court decisions upholding such ordinances would be invalid as violating the Fourteenth Amendment of the Constitution.

The decision in Lovell v. City of Griffin, affirms a long established principle of American jurisprudence to the effect that the newspaper enjoys no more rights under the guaranty of freedom of the press than does any other organization or individual.[41] In this case Alma Lovell was convicted in the Recorder's Court of the City of Griffin, Georgia, for the violation of a city ordinance which prohibited the distribution of circulars, advertising, or literature of any kind without first obtaining written permission of the city manager of the municipality; the superior court refused sanction for a petition for review and the court of appeals affirmed the superior court's judgment. The Supreme Court of Georgia refused an application for a writ of certiorari, but an appeal was taken to the United States Supreme Court, on the ground that the ordinance violated the First Amendment to the United States Constitution guaranteeing

[40] 319 U.S. 190, 63 S.Ct. 997, 1014, 87 L.Ed. 1344 (1943).

[41] 303 U.S. 444, 58 S.Ct. 666, 82 L. Ed. 949 (1938).

freedom of the press; the United States Supreme Court reversed the decision of the Georgia Court of Appeals.

The ordinance in question was as follows:

> Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.
>
> Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance.

The ordinance was all-inclusive, denying every kind of distribution of such material without the permission of the city manager. As the court stated:

> It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager.[42]

It was emphasized further that liberty of the press is one of the personal rights protected by the Fourteenth Amendment against infringement by the states, as well as one of the fundamental guaranties of the First Amendment to the Constitution. Continued the court:

> We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor.[43]

Four United States Supreme Court decisions in 1939[44] declared as many municipal ordinances against distribution of handbills and pamphlets upon the public streets, or other places,

[42] 303 U.S. 444, 451, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

[43] Ibid.

[44] Schneider v. State of New Jersey (town of Irvington); Young v. People of State of California; Snyder v. City of Milwaukee; and Nichols v. Commonwealth of Massachusetts, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

invalid on the ground of interference with the Fourteenth Amendment of the Constitution of the United States. The New Jersey and Wisconsin cases came before the court on writs of certiorari while the California and Massachusetts cases were on appeal; all were considered in one decision, with only Justice McReynolds dissenting.

The first of the ordinances to be considered was the Los Angeles ordinance which provided:

> Sec. 28.00. "Hand-Bill" shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public.
>
> Sec. 28.01. No person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to or upon any automobile or other vehicle.

The appellant was convicted in the Municipal Court of Los Angeles, which decision was affirmed by the Superior Court of Los Angeles County, the highest court authorized to hear a case of this character.[45] The facts were that the defendant distributed handbills to pedestrians upon a public thoroughfare and that when arrested he had approximately three hundred in his possession. These handbills gave notice of a meeting under the auspices of the "Friends Lincoln Brigade" at which meeting speakers would discuss the war in Spain.

The ordinance was sustained by the California court on the basis of police power to prevent the littering of the streets. The court in its opinion stated that the right of free expression is not absolute and that this right is subject to reasonable regulation. The Los Angeles ordinance was distinguished from the ordinance declared invalid in Lovell v. City of Griffin, on the ground that the California ordinance limited handbill distribution in a few places only while the City of Griffin ordinance forbade any distribution whatsoever without a special license from the department of police.

The next ordinance given consideration by the supreme court was one in force in the City of Milwaukee, in part as follows:

> It is hereby made unlawful for any person * * * to circulate or distribute any circular, hand-bills, cards, posters,

[45] People v. Young, 33 Cal.App.2d Supp. 747, 85 P.2d 231 (1938).

> dodgers, or other printed or advertising matter * * * in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the City of Milwaukee.

The defendant in this Wisconsin case was picketing a meat market and distributing handbills asking citizens not to trade with the particular meat market. Numerous persons who were handed these bills or dodgers threw them into the street. The discarded handbills were strewn about the nearby gutter and in the street. When police discovered the situation, the picket was arrested under authority of the handbill ordinance and fined by the Milwaukee County Court, and its judgment was affirmed by the Wisconsin Supreme Court [46] which stated that "unless and until delivery of the handbills was shown to result in a littering of the streets their distribution was not interfered with." The state supreme court distinguished the Milwaukee case from Lovell v. City of Griffin, in that the primary purpose of the Milwaukee ordinance was not to license all such distribution but rather to prevent littering of public places under authority of the police power.

The third ordinance considered by the United States Supreme Court was one in force in the City of Worcester providing:

> No person shall distribute in, or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description.

In this case the appellants had distributed, in the public streets, leaflets which announced a protest meeting, the purpose of which was a protest against the state unemployment insurance administration. There was no evidence that the defendants in the original case threw the leaflets about carelessly; however, those to whom the leaflets were given, in some instances, threw them down on the sidewalk and into the street; some thirty such leaflets were found. The state supreme court upheld the validity of the ordinance [47] on the ground of a valid exercise of the police power and distinguished the case from Lovell v. City of Griffin upon much the same basis that was followed in the Los Angeles and Milwaukee cases, stating:

> It interferes in no way with the publication of anything in the City of Worcester, except only that it excludes the public streets and ways from the places available for free distribu-

[46] City of Milwaukee v. Snyder, 230 Wis. 131, 283 N.W. 301 (1939).

[47] Commonwealth v. Nichols, 301 Mass. 584, 587, 18 N.E.2d 166 (1938).

> tion. It leaves open for such distribution all other places in the city, public and private.[48]

The fourth ordinance in this set of cases, in effect in Irvington, New Jersey, provided:

> No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matter, or call from house to house in the Town of Irvington without first having reported to and received a written permit from the Chief of Police or the officer in charge of Police Headquarters.

The Irvington ordinance further provided that the canvasser must specify the hours in which canvassing was to be made, giving his or her name, address, age, weight, place of birth, police record if any, and other information; the canvasser was required to be photographed and fingerprinted.

Under this ordinance the petitioner, a member of the Watch Tower Bible and Tract Society, affiliated with "Jehovah's Witnesses" was arrested for canvassing without a permit, and convicted in the Recorder's Court, whose judgment was affirmed by the court of common pleas; upon an appeal to the supreme court the lower judgment was affirmed [49] and the court of errors and appeals affirmed the supreme court.[50] In the court of errors and appeals the opinion was given that Lovell v. City of Griffin did not control as the Irvington ordinance was directed against practices not under consideration in the Lovell case. The defendant in her case, when it came before the United States Supreme Court, maintained that in the limitation against canvassing in the interest of certain religious books and pamphlets her freedom of speech and the freedom of the press were violated.

In reversing the several ordinances, the United States Supreme Court stated:

> There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets * * * we hold that a municipality cannot * * * require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate informa-

[48] 301 Mass. 584, 587, 18 N.E.2d 166 (1938).

[49] Town of Irvington v. Schneider, 120 N.J.L. 460, 200 A. 799 (1938).

[50] 121 N.J.L. 542, 3 A.2d 609 (1939).

> tion from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press. [51]

Ordinances prohibiting absolutely the distribution of papers, handbills, pamphlets, and other information are invalid,[52] and ordinances which set a nondiscriminatory license fee, uncontested in amount, from those who sell books and pamphlets, have been held to abridge the guaranties of freedom of speech, press, or worship.[53]

The ordinances of Casa Grande, Arizona, Fort Smith, Arkansas, and Opelika, Alabama, imposing license fees for engaging in the business of selling books or pamphlets, were challenged upon the ground that they violated the guaranty of freedom of the press and freedom of religious worship.

The persons convicted, members of Jehovah's Witnesses, were itinerant ministers who preached the gospel on the streets and in homes, played phonograph records with the consent of householders, and distributed pamphlets and books dealing with religious topics. In the Opelika case, the defendant was convicted on evidence that without a license he had displayed pamphlets on the city streets selling them at the rate of two pamphlets for five cents. The conviction in the Fort Smith case was based on evidence that the defendants solicited a contribution of 25 cents for each religious book but that in some instances the books were given away when the persons solicited were unable to contribute. In the Casa Grande, Arizona, case, the defendant offered books, pamphlets, and tracts for sale at prices ranging from 5 to 25 cents, but when a householder did not wish to purchase or "contribute," the defendant left a leaflet giving a summary of the doctrines which he fostered.

[51] 308 U.S. 147, 162, 164, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

[52] Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939); Schneider v. New Jersey, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

[53] Jones v. City of Opelika, Bowden v. City of Fort Smith, Jobin v. State of Arizona, 319 U.S. 103, 63 S. Ct. 890, 87 L.Ed. 1290 (1943), vacating judgments in 316 U.S. 584, 62 S. Ct. 1231, 86 L.Ed. 1691, 141 A.L.R. 514 (1942).

These convictions were affirmed by the supreme courts of each of the three states, Arizona, Arkansas, and Alabama. Both the Alabama and Arkansas cases, upon writs of certiorari, and the Arizona case, upon appeal, came before the United States Supreme Court, which on June 8, 1942, upheld the convictions; however, on the basis of reargument, this court vacated the judgments affirming the convictions and reversed the judgments of the state courts in each case. On May 3, 1943, when the United States Supreme Court reversed the convictions in Jones v. City of Opelika, Bowden v. City of Fort Smith, and Jobin v. State of Arizona,[54] and vacated its earlier judgments in these cases, it declared unconstitutional a Struthers, Ohio, ordinance making it unlawful to distribute handbills, circulars, or other advertising material, or ring door bells to summon the householders because such prohibition violates the constitutional rights of freedom of speech and press; [55] and also declared unconstitutional a Jeannette, Pennsylvania, ordinance which as applied prohibited Jehovah's Witnesses from selling religious books and pamphlets without licenses.[56]

In Largent v. State of Texas,[57] the defendant was an ordained member of Jehovah's Witnesses, who had offered religious publications of that organization to persons upon whom she called in return for a contribution not to exceed 25 cents for a bound book and several magazines. If no contribution was tendered, the defendant would frequently donate the book and other printed material. The defendant was convicted of violating a city ordinance which made it unlawful for any person without a city permit to solicit orders or to sell books or other merchandise in the resident section of the city. Her conviction was reversed by the United States Supreme Court on the ground that the ordinance under which she was convicted violated the Fourteenth Amendment. The court in giving its opinion concluded:

> It is unnecessary to determine whether the distribution of the publications in question are sales or contributions. The mayor issues a permit only if after thorough investigation he "deems it proper or advisable." Dissemination of ideas depends upon the approval of the distributor by the official. This

[54] 319 U.S. 103, 63 S.Ct. 890, 87 L. Ed. 1290 (1943).

[55] Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).

[56] Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 81 (1943).

[57] 318 U.S. 418, 63 S.Ct. 667, 87 L. Ed. 873 (1943).

> is administrative censorship in an extreme form. It abridges the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment.[58]

In Jamison v. State of Texas,[59] the United States Supreme Court declared unconstitutional a city ordinance of Dallas, Texas, prohibiting the distribution of handbills on streets. The defendant in this case also was a member of Jehovah's Witnesses. It was pointed out that while a state can prohibit the distribution of commercial handbills on the public streets, it cannot prohibit the distribution of handbills in pursuit of a clearly religious activity although the handbills invite the purchase of religious books.

The principle in these cases is that suppression of handbills, circulars, booklets, and other publications cannot be effected on the ground of police power; those who litter the streets may be punished but prevention of littering cannot be the ground of suppressing publication or distribution of such materials.

§ 21. ECONOMIC LIMITATIONS

Freedom to publish newspapers is well-established, but economic factors set practical restrictions.

The absolute freedom of the press is an ideal; first there are the legal restrictions which become operative when the rights of others are infringed. There is likewise the limitation imposed upon the press by the necessity of selecting the most important news; it is mechanically impossible to print all the news, but it is essential that the papers be free to print the important and significant news.

While there are instances where advertisers have likely caused important news to be suppressed, in the modern newspaper world, such instances are rare. The very competition of the various press associations, newspapers, and magazines, as well as radio, is insurance against the total suppression of significant news. There is however the possibility that the very institution of advertising, the desire for newspaper linage and consequent financial return may engender an attitude which will be so markedly favorable to the existing economic order that editorial and news consideration will be conditioned to that end, obliterating fair consideration of liberal political trends.

[58] Ibid., 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 873 (1943).

[59] 318 U.S. 413, 63 S.Ct. 669, 87 L. Ed. 869 (1943).

In a letter to Joseph Pulitzer, Editor of the *St. Louis Post-Dispatch,* President Franklin D. Roosevelt, on November 2, 1938, wrote in part:

> I have always been firmly persuaded that our newspapers cannot be edited in the interests of the general public, from the counting room. And I wish we could have a national symposium on that question, particularly in its relation to the freedom of the press. How many bogies are conjured up by invoking that greatly overworked phrase.

The *Post-Dispatch* held such a symposium; several of the significant opinions given were in part as follows:

> JONATHAN DANIELS, Editor of the *News and Observer,* Raleigh, North Carolina:
>
> * * * The best newspapers have always been published by men whose passion was newspapering and not mere money-making. This is to say, of course, that the best basis for a sound product is pride in craft. In newspapering, as in everything else where profit was regarded as more important than product, slippery fellows have put color into the news as some grocers have put sand in the sugar, as some financiers have put water in the stock, as some politicians have put fixed ballots in the boxes. All four endanger the public. Some hope lies in the faith that in the long run such fellows go down in their own slipperiness. A sounder hope, so far as newspapers are concerned, would be based in vigilant newspaper readers. * * *
>
> No business is so dependent upon the support of all the people of a community as the newspaper. If it fails them in public information, if it fails them in public service, a vigorous people can protest to the newspaper and effectively. The newspaper at its lowest and worst seeks most eagerly for public opinion as a basis for profit; at its best it seeks the welfare of its community as a whole.[60]
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> J. D. FERGUSON, Editor of the Milwaukee *Journal:*
>
> * * * Is "editing * * * from the counting room" intended to refer to the theory that men of outstanding ability in industrial development should be given a fairly free hand, because their methods, practical rather than theoretical, are best calculated to make for the welfare of the general public? We have known some men in the newspaper business who were sincere in that belief.
>
> Or is "editing * * * from the counting room" intended to charge that newspapers are manipulated so that facts are twisted into dollars for the pocket of the publisher? Our belief is that that practice is, as often has been proved, the surest

[60] St. Louis Post-Dispatch Symposium on Freedom of the Press, p. 22.

and shortest road to newspaper suicide. We think that the surest road to lasting financial success for any newspaper is paved with honesty in news presentation and fundamental decency. With that approach the "counting room" is no problem.

We believe most faults of the press as a whole arise from the human element of inadvertence in a newspaper's making and the speed with which it must be turned out, not from perversity.[61]

. L. N. FLINT, former chairman of the Department of Journalism, University of Kansas:

A newspaper that lives from hand to mouth is not likely to have much influence—always granting there are exceptions to rules * * *

The public may insist that it is suspicious of newspapers that make money. As a matter of fact, the public respects such newspapers. When it testifies otherwise, it is simply having its little joke.[62]

Any statement about freedom of the press should consider not only the legal significance of this liberty but also its economic implications and restrictions. While any person is free legally to begin the publication of a newspaper, he faces definite economic realities, which have caused many heartaches and business failures. Lack of initial capital, poor credit management, and unwise administrative policies on both the editorial and business sides of the publishing enterprise have resulted in disaster. What might have been a strong editorial voice has been silenced. The economic pressure in conducting the publishing business has overcome those strong and expressive individuals who have not equipped themselves to understand newspaper management. In other cases, competition with well-established newspapers has resulted in preventing the success of an honest but poorly financed publication.

When large metropolitan newspapers are valued at figures running into millions of dollars and when even a non-metropolitan daily in a city of less than 25,000 population may represent a valuation of several hundred thousand dollars, it is not easy to establish a new newspaper in such a community, or to buy an already established daily.

The days have passed when a shirtful of type and a hand press may be likely to suffice for the publication of a newspaper. The country weekly newspaper has become a sound business institu-

[61] Ibid., 26.

[62] Ibid., 27.

tion, too, and the value of a strongly intrenched weekly may be approximately $25,000 or more.

Such economic conditions do not prevent the publication of a newspaper, but they do set definite handicaps.

The newspaper is no stronger than its financial resources, that is, the resources inherent in its own financing and operation. The paper that is likely to be dishonest is the newspaper that is inefficiently managed and unwisely financed. The newspaper prostitute is not welcome in decent society.

There are muckrakers who charge that freedom of the press is hampered by its advertisers and pressure groups. Instances may be found where sinister influences have been exercised. The same charge of ethical weakness might be made of other professions and institutions. The clergy may not be justly damned because of the moral turpitude of a few wolves in sheep's clothing.

Many newspapers are too strong to be influenced by any advertiser. Certain elements may charge that advertising limits freedom of the press. The institution of advertising based on the profit motive, it is true, is one of the main resources of the press and may establish in the publishing mind certain inhibitions. Under the present organization of society, however, there would not seem to be a moral wrong in the making of a legitimate profit.

Publishing as a business cannot be damned because of the inequities of a few. The newspaper is a product, its publisher is a merchant of current facts, well-balanced opinions, and entertainment features. He can no more be dishonest in his product than can the manufacturer of infant foods. If he becomes dishonest over a period of time, he will be discredited by his public; the good will value of his publication will be jeopardized.

CHAPTER 4

RIGHTS OF THE PRESS

Sec.
22. The Right to Publish.
23. When Equity Intervenes.
24. Newspaper Name Protection.
25. Property Rights in News.
26. Right to Refuse Service.
27. Radio Competition.
28. Access to Public Records.
29. The Rights to Report and Comment.
30. Right to Postal Privileges.

§ 22. THE RIGHT TO PUBLISH

Journalism as a lawful profession and business enterprise is protected against both Federal and state interference.

Publishing is a lawful occupation and as such enjoys the protection of the First Amendment of the United States Constitution against encroachment by the Federal government and the guaranty of the Fourteenth Amendment of the Federal Constitution against any state action which might infringe the liberty of expression.

In Allgeyer v. State of Louisiana,[1] liberty was defined not only as freedom from physical restraint but also as the right of the citizen to be free in the use of all his facilities. This liberty, the court added in its opinion, embraces the right of the citizen "to be free in the enjoyment of all his facilities; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

The right to publish includes on the one hand the right to report occurrences[2] and to comment upon public affairs,[3] and on the other hand, the right to own and control property rights in

[1] 165 U.S. 578, 589, 17 S.Ct. 427, 41 L.Ed. 832 (1897).

[2] Hysko v. Polonia Pub. Co., 239 Mich. 676, 215 N.W. 3 (1927).

[3] Warren v. Pulitzer Pub. Co., 336 Mo. 184, 78 S.W.2d 404 (1935).

the making of a product dependent upon the right of expression, that is, a newspaper or other printed publication.

While the newspaper enjoys the right to publish information and comment, some correlative liabilities must be faced. These liabilities are, in the main, the possibilities of damages for injury to the right of reputation of others, the liability of being cited for contempt of court, the danger of making a copyright infringement, the possibility of the violation of privacy, infraction of postal regulations, and, under certain conditions, penalty for publishing fraudulent advertising. Such liabilities are discussed elsewhere in this study.

An important question arises in regard to the liability of a newspaper for publishing information, as in a news story or feature article, which may cause mental distress or resulting physical injury to the reader.

In Curry v. Journal Pub. Co.,[4] the defendant publisher was held not liable for physical injury to the reader of a newspaper which published, falsely, in a news story the death of the reader's father. In MacKown v. Illinois Publishing & Printing Co.,[5] an action was dismissed which sought damages for injury from a dandruff remedy mentioned in an article in the defendant newspaper. The principle on which these cases were decided rested upon the fact that the advice was not offered with a knowledge that it would be used under the conditions applicable to any one individual. As was stated in Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp.,[6] "negligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all."

Although the newspaper is a private business rather than a public utility[7] and its rights to report and comment are no greater than the rights of any individual,[8] the newspaper is subject to

[4] 41 N.M. 318, 68 P.2d 168 (1937).

[5] 289 Ill.App. 59, 6 N.E.2d 526 (1937).

[6] 245 N.Y. 377, 157 N.E. 272, 273, 56 A.L.R. 1186 (1927).

[7] Philadelphia Record Co. v. Curtis-Martin Newspapers, 305 Pa. 372, 157 A. 796 (1931); In re Wohl, 50 F. 2d 254 (D.C.Mich.1931); Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813, 87 A.L.R. 975 (1933).

[8] Hysko v. Polonia Pub. Co., 239 Mich. 676, 215 N.W. 3 (1927); Van Lonkhuyzen v. Daily News Co., 203 Mich. 570, 170 N.W. 93 (1918); Bee Pub. Co. v. Shields, 68 Neb. 750, 94 N.W. 1029 (1903); Commercial Pub. Co. v. Smith, 149 F. 704 (C.C.A.Tenn. 1907).

the general law of the land quite as much as any other business or industry conducted for profit.

"A publisher of a newspaper has the same rights, no more or less, than individuals, to speak, write, or publish his views and sentiments, and is subject to the same restrictions," stated the court in Curry v. Journal Pub. Co.[9]

Regulations for a newspaper publishing organization or a press association in its ordinary business relations other than its right to be a private business and its right to enjoy the full meaning of liberty of the press, are valid. How far such regulation may be legally enforced depends of course upon the exact question in any particular case.

In Associated Press v. National Labor Relations Board,[10] the question arose whether the discharge of Morris Watson, an employee of the New York office of the Associated Press, violated the National Labor Relations Act [11] which conferred on employees the right to organize, join, or assist labor organizations to bargain collectively through representatives or engage in collective bargaining activities or other activities for mutual aid or protection. The order of the National Labor Relations Board was upheld by the circuit court of appeals and affirmed by the United States Supreme Court which stated that the distribution of news by the Associated Press is interstate commerce and that the regulations of the labor board did not jeopardize such distribution of news. In its opinion the court by a five to four decision stated:

> The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws * * * The order of the board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt.[12]

It should be noted however that the minority opinion presents a strong argument, both legally and journalistically. In part, Justice Sutherland in his dissenting opinion, in which there was

[9] 41 N.M. 318, 68 P.2d 168, 175 (1937).

[10] 301 U.S. 103, 57 S.Ct. 650, 81 L. Ed. 953 (1937).

[11] 29 U.S.C.A. § 157.

[12] 301 U.S. 103, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937).

concurrence by Justices Van Devanter, McReynolds, and Butler, stated:

> * * * When applied to the press, the term freedom is not to be narrowly confined; and it obviously means more than publication and circulation. If freedom of the press does not include the right to adopt and pursue a policy without governmental restriction, it is a misnomer to call it freedom. And we may as well deny at once the right of the press freely to adopt a policy and pursue it, as to concede that right and deny the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated * * *
>
> It would seem to be an exercise of only reasonable prudence for an association engaged in part in supplying the public with fair and accurate factual information with respect to the contests between labor and capital, to see that those whose activities include that service are free from either extreme sympathy or extreme prejudice one way or the other. And it would be no answer to say that dealing with news of this character constitutes only a part of the duties of the editorial force. The interest of a juror, for example, in the result which excludes him from sitting in a case, may be small and the adverse effect upon his verdict by no means certain. Nevertheless, the party affected cannot be called upon to assume the hazard. In the present case, by a parity of reasoning, the hope of benefit to a cherished cause which may bias the editorial employee is a contingency the risk of which the press in the exercise of its unchallengable freedom under the Constitution may take or decline to take, without being subject to any form of legislative coercion.[13]

It is submitted that the minority has an argument which is strongly held by many publishers. If the Associated Press is to report objectively disputes between labor and capital, or between the Congress for Industrial Organization and the American Federation of Labor, how can it perform its function if its own workers are themselves affiliated with either one of the major labor organizations in dispute? While the legal argument of the majority in this case presents a valid argument so far as the application of the general law indiscriminately to the publishing industry, it would seem that it does not fully take cognizance of the necessity for newspaper and press association workers being in at least a quasi judicial attitude in their reporting of public events. This criticism of the decision does not however propound or accept any idea that newspaper or press association personnel should not be organized for their mutual benefit.

[13] 301 U.S. 103, 57 S.Ct. 650, 657, 658, 81 L.Ed. 953 (1937).

§ 23. WHEN EQUITY INTERVENES

An injunction will be issued against suppression of a newspaper on the ground that it disturbs the public peace, that it is a public nuisance, or that a municipal license is required for its publication.

The right to publish a newspaper has been given further protection against infringement by the issuance of injunction against cities which have passed an ordinance licensing a newspaper or a resolution that a newspaper may be suppressed on the ground that it might disturb the peace. The city of Mount Vernon, New York, passed an ordinance that no person should print, sell, or distribute newspapers in that city without first obtaining a license from the common council, which was granted absolute discretion to grant or refuse such a license as well as the power to revoke such license at any time if once granted; no notice was required. The publishers of the newspaper sought an injunction against the enforcement of the ordinance; the injunction was granted.[14]

The township of North Bergen, New Jersey, passed a resolution forbidding the circulation of a newspaper printed in the German language; in the New Yorker Staats-Zeitung v. Nolan [15] in granting temporary relief, the court pointed out:

> * * * If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited * * * The duty of the township officials is to suppress the disorder and to punish those who are guilty of the illegal act, not to prevent the performance of the act.

In 1921, The *Dearborn Independent* was circulated for sale upon the streets of Cleveland, Ohio; four vendors of the paper were arrested and held for trial on the criminal charge of offering for sale a certain indecent and scandalous publication in violation of a Cleveland city ordinance. In that case it was held that if the articles contained in the *Dearborn Independent* might tend to excite breaches of peace against members of the Jewish race, public officials charged with the duty of preserving the peace should suppress persons guilty of such disturbances rather than interfere with innocent persons' exercise of their lawful and equal

[14] Star Co. v. Brush, 104 Misc. 404, 172 N.Y.S. 320 (1918).

[15] 89 N.J.Eq. 387, 388, 105 A. 72 (1918).

rights. A preliminary injunction was granted against the enforcement of the ordinance in this case.[16]

This right to publish includes immunity from the restriction of being declared a public nuisance. The *Sunday Sun* was declared by the city of Sequin, Texas, a public nuisance and its circulation within the city limits prohibited. The court, however, stated upon appeal:

> This ordinance is in violation of the bill of rights and therefore void. * * * We are not informed of any authority which sustains the doctrine that a municipal corporation is invested with the power to declare the sale of newspapers a nuisance. The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise. The doctrine of the constitution must prevail in this state, which clothes the citizen with liberty to speak, write, or publish his opinion on any and all subjects, subject alone to responsibility for the abuse of such privilege.[17]

Denial of a petition for a writ of habeas corpus by the trial court was reversed by the court of criminal appeals.

In Near v. State of Minnesota ex rel. Olson,[18] a Minnesota statute, providing for the abatement of a malicious, scandalous, and defamatory newspaper as a public nuisance and specifying that all persons guilty of such nuisance may be enjoined, was declared unconstitutional. In other words, the holding was in effect that the injunctive process on the basis of authority of this particular statute could not be used.

In a significant case, Ulster Square Dealer v. Fowler,[19] an injunction was granted against the defendants, restraining them from "entering upon the premises of the plaintiff for the purpose of seizing and carrying away any future issues of its publication or in any manner interfering with its publication."

The court took the position that no one can take the law unto himself and suppress in advance the publication of sentiments of another citizen on any public or private question.

Equity will grant injunctive relief in law of the press cases when there is no full, complete, and adequate remedy at law, particularly when some basis of a property right is threatened.

[16] Dearborn Pub. Co. v. Fitzgerald, 271 F. 479 (D.C.Ohio 1921).

[17] Ex parte Neill, 32 Tex.Cr.R. 275, 276, 22 S.W. 923, 40 Am.St.Rep. 776 (1893).

[18] 283 U.S. 697, 51 S.Ct. 625, 75 L. Ed. 1357 (1931).

[19] 58 Misc. 325, 111 N.Y.S. 16, 18 (1908).

In Gee v. Pritchard,[20] an injunction was granted against the publication of material which might have injured the author; the basis of this decision was that the writer had a property right in certain letters. An outstanding American case, Baker v. Libbie,[21] gives adequate basis for the principle that equity will grant relief against a threatened publication of letters by the recipient, but the relief granted in a case of this character is not against any damaging material in the letters themselves, but rather against an infringement of a property right in the composition, that is, a common law copyright. It makes no difference that the letters are addressed and mailed to another; the common law property right in a private letter remains in the author, despite the fact that the letter itself may have no truly literary value.

The court held in Brandreth v. Lance [22] that equity possessed no jurisdictional powers to prevent the publication of a literary work upon the claim that such publication would be libelous; the basis of this decision was that to grant an injunction in case of a prospective libel would be to interfere with the freedom of the press. To grant injunctive relief in such a case would be assuming in advance what would be within the province of a jury to determine after the publication of the material alleged to be libelous.

In Routh v. Webster,[23] the defendants published prospectuses in which the plaintiff's name was used, without authority, as a trustee of a joint-stock company. The court held that equity could restrain the unauthoritative use of a name. It is submitted that the Routh case was rightly decided, in accordance with equity jurisdiction to protect a property right. To use another's name without authority in a questionable enterprise might easily threaten that person's credit, and so his property interest.

In Casey v. Cincinnati Typographical Union [24] the complainant asked an injunction against the defendants who, it was charged, were boycotting the complainant and his newspaper. An editorial in the *Bulletin*, an official organ of the Union requested that organized labor recognize the rights of labor by withdrawing patronage from the *Commonwealth*, the paper published by

[20] (1818) 2 Swans. 402.

[21] 210 Mass. 599, 97 N.E. 109, 37 L. R.A.,N.S., 944, Ann.Cas.1912D, 551 (1912).

[22] 8 Paige 24, 34 Am.Dec. 368 (N.Y. 1839).

[23] Routh v. Webster, (1847) 10 Beav. 561, 50 Eng.Rep. 698.

[24] 45 F. 135, 12 L.R.A. 193 (C.C. Ohio 1891).

the plaintiff, that organized labor and its members not patronize merchants who advertised in the plaintiff's publication, and that they have nothing to do with any merchant taking the paper unless such merchant stops the "rat" sheet.

In granting a temporary injunction in Casey v. Cincinnati Typographical Union, to continue in force until a final decree was issued, the court rejected the argument that the defendant's acts and published statements were mere incidents of competition.

This case serves as one outstanding authority for the intervention of equity to prevent destruction of a business through conspiracy, threats, and published statements to carry out the conspiracy. Clearly this case does not establish American authority for granting equitable relief in libel, but it stands as authoritative precedent that any statement, libelous or otherwise, issued in furthering a conspiracy against business, may be enjoined. It should be noted however that the relief in such a case is not given as against the libel itself but rather against the act (the conspiracy) of which the damaging statements and/or threats are but one type of element to be considered.

The court, basing its opinion in part on the doctrine of Emack v. Kane,[25] cited the following from that case:

> Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and to intimidate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ.

Equity refused to grant relief in Prudential Assurance Co. v. Knott [26] when the plaintiff charged that the publication of a certain pamphlet on life insurance companies contained erroneous statements and that the continued publication of the pamphlet would be injurious to the plaintiff's credit and reputation and could not fail to damage the company's credit and otherwise threaten its business. The court observed in its opinion that the publication was a libel or that it was not; that if the publication were a libel, a chancery court would have no jurisdiction to restrain its publication; that if there were no libel, it would seem that the court could not act as either a censor or a critic to restrain the publication of statements which would be held justifi-

[25] 34 F. 46, 51 (C.C.Ill.1888). [26] (1875) 10 Ch.App. 142.

able at common law. The defendant endeavored to show that the good will of the company was property and that therefore equity would have a right to intervene on the ground of protection of property; however, despite this argument, the court refused the injunctive relief.

Prudential Assurance Co. v. Knott [27] may be distinguished from Dixon v. Holden [28] in that, in the former, injunctive relief was refused to stop a possibly libelous publication and that, in the latter, equitable relief was granted on the theory that one's name is a kind of property. In both cases, there was a threatened damage to a financial interest. In the Dixon case, it was the misuse of one's name that was restrained; in the Prudential case however equity refused to restrain the publication of a libel but rather left the injured party to his remedy in a court of law.

§ 24. NEWSPAPER NAME PROTECTION

Title of a publication as either trade-mark or trade name if registered under Federal law is protected against infringement; though not registered a trade-mark or trade name if established in actual commerce may be protected under the law of unfair competition.

A newspaper has a right to its name. Though a newspaper name is a trade name, it is regarded as a trade-mark or kind of intellectual property subject to protection in law and equity. A trade-mark is associated with goods themselves and may not be given legal protection in gross. A trade name is more properly associated with the good will of a business.

In practice the name of a publication such as a newspaper is closely associated with the product itself and serves to identify this product. The United States Patent Office has allowed registration of newspaper names as trade-marks.

Even though the name of a newspaper is not registered as a trade name, it enjoys the protection of the law of unfair competition. For one to produce a newspaper with a name like that of another newspaper in the same locality would be fraud; it would amount to confusion and the paper first entitled to the use of the name could enjoin the second publication from using the identical title and could obtain damages if actual injury resulted.

The law of trade-marks is really a part of the broader law of unfair competition; registration of a trade name or a trade-mark

[27] Ibid. [28] (1869) 7 L.R.Ch. 488.

in the United States Patent Office does not create the trade-mark or establish its validity; registration is evidence of the presumptive right to protection of a trade-mark used on goods in interstate commerce, and commerce with foreign countries and the Indian tribes.[29]

The Federal law on trade-marks is without effect to limit or extend, except in so far as interstate commerce is concerned, as to remedies, the substantive rights acquired under the common law.[30]

The testing of the right of a newspaper to the exclusive use of its title arose in the case of the Pulitzer Pub. Co. v. the Houston Printing Co.[31] The complainant sought to enjoin the use of "Post-Dispatch" as the title of a newspaper published by the defendant. From 1878 to August 1, 1924, the *St. Louis Post-Dispatch* was the only large metropolitan paper in the United States using that name. There were however numerous other newspapers in smaller localities using such a title, for example, the Dardanelles, Ark., *Post-Dispatch,* the Sykesville, Pa., *Post-Dispatch,* the Center, Colo., *Post-Dispatch,* and the Rockingham, N. C., *Post-Dispatch.* The Pulitzer Publishing Company on March 15, 1924, filed an application for the registration of its name with the United States Patent Office, and subsequently a certificate of registration was awarded the Pulitzer company. Later in 1924 the Houston Printing Company of Houston, Texas, the principal office of which corporation is some 800 miles from St. Louis, Missouri, began the publication of a newspaper, known as the *Houston Post-Dispatch,* having acquired and merged two Houston newspapers, the *Post* and the *Dispatch.*

Evidence given at the trial indicated that 90 per cent of the circulation of the *Houston Post-Dispatch* was confined to within fifty miles of Houston. There were no affidavits to the effect that there was a single lost sale of a paper or a subscription by the *St. Louis Post-Dispatch.*

[29] United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97, 39 S. Ct. 48, 51, 63 L.Ed. 141 (1918): "Property in trade-marks and the right to their exclusive use rest upon the laws of the several states, and depend upon them for security and protection; the power of Congress to legislate on the subject being only such as arises from the authority to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

[30] Pulitzer Pub. Co. v. Houston Printing Co., 4 F.2d 924 (D.C.Tex. 1925), aff., 11 F.2d 834 (C.C.A.1926).

[31] Ibid.

The court refused to enjoin the use of the words, "Post-Dispatch," by the Houston Printing Company, despite the fact that there may have been some insignificant confusion in the minds of persons asking for "The Post-Dispatch" at newsstands.

The Federal Trade-Mark Act is clear that any mark which merely in words or devices describes the goods, or their quality or character shall not be registered under the terms of the act. A purely descriptive name, however, though not originally capable of exclusive appropriation as a trade-mark, may become secondarily significant in denoting that a product comes from one particular source and its user thus acquires a superior right in the use of this particular mark or designation.

"Secondary meaning" signifies that a name or title has become established in the public consciousness or in commerce so that any reference to that name or title brings a mental association with a particular thing, product, or service. A purely descriptive mark cannot become personal property as a trade-mark or a trade name, but when a descriptive mark has a secondary value, another person cannot use this mark in connection with a product, if and when any deception is involved in the practices of the second user.[32]

If a publication's name is established, the publication acquires a property right as a trade-mark at common law, or more properly a trade name, which will be protected in equity. It was stated in Robertson v. Berry:[33]

> A publisher or author has either in the title of his work or in the application of his name to the work * * * a species of property similar to that which a trader has in his trade-mark, and may like a trader claim the protection of a court of equity against such a use or imitation of the name, marks or designation, as is likely in the opinion of the court to be a cause of damage to him in respect of that property.

In Gannert v. Rupert,[34] it was held that the magazine *Comfort*, a title founded as a common law trade-mark, was infringed by another publication, *Home Comfort*. *Photo-Play Journal* was held to infringe the title of the earlier established *Photoplay Magazine*,[35] which although descriptive in title and so not registrable as a trade-mark had acquired a secondary meaning.

[32] Barton v. Rex-Oil Co., 2 F.2d 402, 40 A.L.R. 424 (C.C.A.Pa.1924).

[33] 50 Md. 591, 596, 33 Am.Rep. 328 (1878).

[34] 127 F. 962 (C.C.A.N.Y.1904).

[35] Photoplay Pub. Co. v. La Verne Pub. Co., 269 F. 730 (C.C.A.Pa.1921).

In Collegiate World Pub. Co. v. Du Pont Pub. Co.,[36] the plaintiff published a magazine under the title, *College Humor,* obtained a trade-mark registration, and attempted to enjoin the defendant's publication entitled, *College Comics,* with the subtitle, *College Wit—the World's Best Humor.* The court held for the defendant on the ground that the plaintiff's title, *College Humor,* was invalid. It was emphasized that a name that is merely descriptive of the qualities or composition of the contents cannot be monopolized as a trade-mark.

Mere similarity of names in itself does not prevent use of a particular name by a publication. Protection is afforded under state statutes on trade-mark property, or under the Federal law on trade-mark registration when valid registration is made, and under the law of unfair competition.

Many publications have similar names which if definitely established in commerce may have protection under the theory that the names have become so well known over a period of time that they have acquired a secondary meaning.[37]

§ 25. PROPERTY RIGHTS IN NEWS

News stories enjoy protection as quasi property under the law of unfair competition.

News stories as such have an intrinsic quality, different from purely literary composition. News is fleeting; it is of value for the moment, then as out of date as last year's calendar so far as value to the journalistic profession may be concerned. It is this intrinsic element that the newspapers wish to protect, not necessarily the literary style in which the particular story may be expressed. True enough, the literary style of some special dispatch by a noted war correspondent or political observer, the newspaper may wish to protect; it may of course do so under the Copyright Act. The problem however is not with the special story by an outstanding writer, but rather with the mine-run

[36] 14 F.2d 158 (D.C.Ill.1926).

[37] Ibid., 14 F.2d 160 (D.C.Ill.1926): "Similarity in names dealing with the same subject is not unusual, but on the contrary is quite common, such as Popular Science, Popular Mechanics; Outdoor Life, Outdoor Recreation; Field and Stream, Forest and Stream; Boy's Life, Boy's Magazine; Ladies Home Journal, People's Home Journal; Radio Doings, Radio Digest, Radio World, Radio Age, Radio Progress, Radio News, Radio Broadcast; Motor, The Motor, Motor Transport, Motor Record, Motor World, Motor Age, Motor Life; etc."

type of news that day to day becomes the essence of the newspaper's value to the reader.

If Sir William Blackstone may be cited, property "is the sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe." [38] The right of property is the right to own, use, and dispose of a thing tangible or intangible. In a strict legal sense, property may be regarded as an aggregate of rights, guaranteed by the government; in the ordinary sense, property signifies the thing itself rather than the rights attached thereto.[39]

To appreciate properly and understandingly the problem involved in the protection of news stories, it is helpful to disintegrate a news story into its elements. It is said that a scientist remarked one time that he could understand nothing unless it were expressed in the terms of a formula. The news story may be so expressed, as follows:

The news story is equivalent to X (an event) plus Y (the acquisition of facts pertinent to the event) plus Z (the rhetorical expression of the facts, that is, literary expression).

The event itself is ordinarily *publici juris,* or may be made so upon discovery. The event once disclosed therefore may be regarded as common property unless the facts concerning it are protected as herein later explained. If the facts of an event are known to but one person, that person has exclusive right to such facts; unless compelled to do so, he need not reveal the facts to anyone in the world; the exception of course is that one person knowing certain facts may be forced to reveal them upon threat of contempt of court; if two persons know certain facts, either may be compelled to reveal them if such facts are pertinent to a trial, unless the information may be legally regarded as a privileged communication.

All events of course are not public. There are secret events as of a secret society meeting, or a secret agreement between individuals. If another discovers such events or agreements, he may so report them independently, perhaps at his personal peril, but there is no general law preventing him from so doing.

[38] 2 Blackstone 1.

[39] Fulton Light, Heat & Power Co. v. State, 65 Misc. 263, 121 N.Y.S. 536 (1909), aff., 138 App.Div. 931, 123 N.Y.S. 1117 (1910).

Take the automobile accident, for example. Any one who sees the event may report the event. If there is a merger of two large banking houses, the outsider who ascertains the facts may report them.

Much of the news that appears in the press is so discovered and reported; the event so reported may be likewise told by others who hear about that event.

The newspaper however has no exclusive right to report public events; this right is clearly protected by the First Amendment to the Federal Constitution in declaring the rights of freedom of speech and liberty of the press. The situation is that the newspaper, while not possessing any better right than any member of the public, does nevertheless have better means and opportunity for reporting the general run of events than does the nonprofessional writer.

The second term of the equation, or the acquisition of facts pertinent to the event, involves a system for learning about the existence of facts, the gathering of the facts, and the preparation of the facts for publication. A devastating fire may destroy a small city in Idaho, for example; there would likely be a correspondent there who would file a report of the facts to a press association; all newspaper clients or members of the association would have the benefit of that particular set of facts expressed in news story form. The member newspaper could use the facts or it could disregard them as unimportant to its particular readers or subscribers.[40]

The newspaper is equipped not only to ascertain facts about events but also to publish them in newsprint and to distribute such printed newsprint or newspapers over a wide area.

The metropolitan newspaper represents a large investment in its physical equipment, its building owned or leased, its telegraph, telephone, cable and wireless systems or affiliations, as well as its contracts with news and feature service agencies. Such a newspaper has a staff of employees which it has trained; it has established news "runs" or "beats" by which it periodically contacts many news sources for possible news.

Its investment in capital goods runs into huge sums; such capital goods include typesetting, stereotyping and printing machin-

[40] A newspaper is not a public utility. See Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813, 87 A.L.R. 975 (1933), holding that newspapers are not required to print either news or advertising.

ery, equipment for mailing and other forms of distribution. This system by which the large newspaper functions is represented in a lesser degree by the nonmetropolitan press, practically all the daily newspapers of which group are members or clients of press associations.

In legal concept, the newspaper represents a business, not dissimilar to other types of commercial enterprise; it would seem that such an institution should have equitable protection in the selfsame fashion as any other business.

Courts clearly recognize the right to do business and in fact regard this right as one form of intangible property, a right protected by injunction on the basis of unfair competition. The very system or organization through which a business operates may be so protected. In Meccano v. Wagner,[41] it was held that there was unwarrantable appropriation of the methods and system of the complainant. In that case the court stated:

> Unfair competition exists also in that the complainant has established a business system which is peculiarly its own. This was done at the expense of time, thought, labor, and much money. If it be assumed that this court is in error with respect to the finding of palming off of defendant's goods for the complainant's establishing thereby unfair competition, yet the defendants use complainant's business and the system it has established. In these it has acquired a property right of which its competitor cannot deprive it by introducing his goods into, and as a part of, the complainant's business and business system.[42]

This right to conduct a business is well established in a line of equity cases. It seems that this right is protected when there is pirating of a laundry or milk route by a former employee; these cases indicate that it is not the particular customer that represents a property interest, but rather the names, the contacts, and the system in continuity, representing time, labor, money, and management, for which system protection is afforded.

On the basis of equity's right to grant relief when there is no full, complete, and adequate relief at law, protection is given business by injunction, in case of depredations upon business and its system either by a former employee or by a competitor.

It seems clear and well established, therefore, that news gathering and distribution by an organization systematically organ-

[41] 234 F. 912 (D.C.Ohio 1916); see also Prest-O-Lite Co. v. Davis, 209 F. 917 (D.C.Ohio 1913).

[42] 234 F. 912, 920.

ized for that purpose may be protected against unfair competition, provided the evidence of violation of the right to conduct a business is sufficient and there are no procedural errors.

It seems clear also that news is quasi property, or such property that possesses attributes in the nature of a civil right sufficiently pecuniary in character to give equity jurisdiction in the case of unfair competition.[43]

The third part of the equation given for explanatory purposes concerns the literary style, order of statement, and expression in which the news story is written. At common law, any literary work, if unpublished, remains the property of the writer. When publication is made, common law copyright is lost, and the particular literary expression becomes public property.

Statutory copyright, founded upon the United States Constitution, Art. 1, Sec. 8, Cl. 8, makes up for the deficiency of the common law. The general provisions of the Copyright Act are sufficiently clear; what may be copyrighted may be easily ascertained in so far as such publication is standard literary material. For the purposes of this study, the question arises as to how far the Copyright Act aids the newspaper.

The registration of a copyright for a newspaper must follow the usual requirements for copyright, the application, the paying of the required fee, the giving of notice, and the filing of two complete copies of the newspaper. If substantial changes are made in the editions, even though these editions bear the same date line, a separate copyright should be sought for the substantially changed edition. Provision for copyrighting the entire newspaper is covered in part under Class b, Sec. 5 of the Copyright Act.

The news element itself is not copyrightable, however, as was pointed out in International News Service v. Associated Press.[44] A news story may be so written that it is a literary production; such a news story may be copyrighted; on this point reference may well be made to Chicago Record-Herald Co. v. Tribune Assn. in which the court stated:

[43] See Walsh, W. F., on Equity, Section 44, pp. 221–223; Ibid., Section 47, pp. 234–237; Truax v. Raich, 239 U.S. 33, 37, 38, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas. 1917B, 283 (1915); Brennan v. United Hatters, 73 N.J.L. 729, 742, 65 A. 165, 9 L.R.A.,N.S., 254, 118 Am.St. Rep. 727, 9 Ann.Cas. 698 (1906); and Barr v. Essex Traders Council, 53 N. J.Eq. 101, 30 A. 881 (1894).

[44] 248 U.S. 215, 39 S.Ct. 68, 63 L. Ed. 211, 2 A.L.R. 293 (1918).

> It is true that news as such is not the subject of copyright, and so far as concerns the copyright law, whereon this action is based, if the Herald publication were only a statement of the news which the copyrighted article disclosed, generally speaking, the action would not lie. But in so far as the Edwards article involves authorship and literary quality and style, apart from the bare recital of the facts or statement of news, it is protected by the copyright law. That the entire copyrighted article involves in its production authorship as generally understood, and manifests literary quality and style in striking degree, is impressively apparent from its perusal. [45]

The same procedure is provided for the copyrighting of a newspaper story as is provided for the copyrighting of an entire newspaper, except that in the case of the copyright for a newspaper story, but one copy of the story need be filed; that is, one complete copy of the newspaper containing the newspaper story sought to be copyrighted must be filed. It is not sufficient to clip the story and send that clipping alone to the Register of Copyrights.

Some of the difficulties involved in the copyrighting of a newspaper story may be appreciated in the experience of the *New York Times,* which endeavored to copyright a story on Capt. R. Amundsen's discovery of the South Pole. A quotation from Richard C. De Wolf, former Register of Copyrights, illustrates a practical difficulty:

> A temporary injunction was hastily obtained about midnight of March 8, but the required copies of the newspaper containing the copyrighted story were not mailed until early in the morning of March 9. Although the difference was only one of a few hours, it was held that the action had been brought before it was permissible and the injunction was held void. [46]

The basis for this denial was that a suit for infringement of copyright cannot be instituted unless and until the required copies are deposited and the claim for copyright registered; this stipulation is included in Sec. 12, Copyright Act of March 4, 1909, as follows:

> No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and the registration of such work shall have been complied with.

[45] Chicago Record-Herald Co. v. Tribune Ass'n, 275 F. 797, 798 (C.C.A. Ill.1921); see also Amdur, Leon H., Copyright Law and Practice, pp. 116, 117.

[46] De Wolf, Richard C., An Outline of Copyright Law, pp. 49, 50; see New York Times Co. v. Star Co., 195 F. 110 (C.C.N.Y.1913); New York Times Co. v. Sun Printing & Publishing Ass'n, 204 F. 586 (C.C.A.N.Y. 1913).

It is plain that the copyright law is not adequate to protect the news element of the newspaper story. If the particular story is rewritten in another newspaper office, the literary style of the original story may be entirely changed so that even an action for infringement of copyright would not likely be successful. Real protection must come through the injunction against unfair competition.

Closely related to copyright protection is the possibility of trade-mark utilization. Federal statute makes provision for the registration of a series of literary productions; however, the trade-mark should not be the name of one of the series.[47] The series of writings of a columnist appearing under a standard set headline may be trade-marked; it would not be possible, however, to trade-mark one day's column; it is necessary that the series be continued over a period of time and that it have the same identification or title indicating the work of a particular author.

The column title or headline would be regarded as the identification of the author or originator, the same as a certain mark would indicate the physical product of a craftsman. The copy of such a column for a particular day, if regarded as a literary product, could be copyrighted as well; the copyright would protect the immediate, particular column; the trade-mark would protect the title or headline identifying the entire series. It should be noted that although copyright is obtained through the Library of Congress, trade-mark registration for such a series of literary material is through the United States Patent Office.

When a newspaper or an advertiser orders a photograph taken, the rights to the photograph belong to the newspaper; if a person poses for a news photograph taken and paid for by the newspaper or the advertiser, the rights to the photograph belong to the one who pays for the photograph.[48]

It should be noted that a distinction exists between the news element of a newspaper story and a so-called news tip. "A tip is an ultimate fact."[49] In International News Service v. Associated Press, Justice Pitney stated:

[47] See U.S.Code Annotated, Title 15, § 85, note 60.

[48] Lumiere v. Robertson-Cole Distributing Corp., 280 F. 550 (C.C.A.N.Y.1922); Press Pub. Co. v. Falk, 59 F. 324 (C.C.N.Y.1894); Altman v. New Haven Union Co., 254 F. 113 (D.C.Conn.1918).

[49] According to J. B. Martineau, Esq., counsel for the Chicago Tribune.

> We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after rewriting and without independent investigation and verification * * * both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business.[50]

The essence of the distinction may perhaps better be shown by illustration. If there is used by one press association a story about an unusual murder in Davenport, Iowa, and a rival press association learns about the story directly or indirectly through the first press association, it is the practice to use the first press association story as a tip; the second press association on the basis of this tip would communicate with the correspondent at Davenport to investigate, verify, and file a story on the aforesaid murder; such a transaction might not encompass more than a fraction of an hour. Such a practice would be regarded as entirely fair; on the contrary, it would be regarded as unfair for one press association to write or rewrite a story on the basis of the other press association's story without independent investigation.

§ 26. RIGHT TO REFUSE SERVICE

The newspaper is not a public utility and so may do business with whomever it may choose.

The newspaper is a private enterprise and as such may carry on business transactions with whom it pleases. If its managers so desire they may refuse to carry advertising for individuals or business, may refuse to sell newspapers to individuals or news agents, or to publish news stories about any particular event or on any opinion. By weight of authority, the newspaper is not a public utility.

In Shuck v. Carroll Daily Herald,[51] a leading case on this subject, the petitioner sought to compel the *Herald* by mandatory injunction to accept its advertising for its cleaning and dyeing service. The court in denying the prayer of the petitioner held:

> The newspaper business is an ordinary business. It is a business essentially private in nature—as private as that of the baker, grocer, or milkman, all of whom perform a service on which, to a greater or less extent, the communities depend,

[50] 248 U.S. 215, 39 S.Ct. 68, 74, 63 L.Ed. 211, 2 A.L.R. 293 (1918).

[51] 215 Iowa 1276, 247 N.W. 813, 87 A.L.R. 975 (1933).

but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with the public use. If a newspaper were required to accept an advertisement, it could be compelled to publish a news item. If some good lady gave a tea, and submitted to the newspaper a proper account of the tea, and the editor of the newspaper, believing that it had no news value, refused to publish it, she, it seems to us, would have as much right to compel the newspaper to publish the account as would a person engaged in business to compel a newspaper to publish an advertisement of the business that that person is conducting.

Thus, as a newspaper is a strictly private enterprise, the publishers thereof have a right to publish whatever advertisements they desire and to refuse to publish whatever advertisements they do not desire to publish. [52]

In Friedenberg v. Times Pub. Co.,[53] the plaintiff sued for damages because the defendant newspaper refused to accept his advertising. The trial court dismissed the suit and its decision was affirmed by the supreme court which stated:

The weight of authority is that the publishing of a newspaper is a strictly private enterprise, and the publishers thereof are free to contract and deal or refuse to contract and deal with whom they please. [54]

Difficulties sometimes arise when newspapers attempt to control their own distribution and sale of newspapers. The rule is clearly that inasmuch as newspapers are not public utilities they can sell their papers to whomever they please. The question of course does not involve any problem so far as selling to the individual, but rather in selling to agents or distributors for resale.

The *Chicago Tribune* once refused to sell its papers to distributors who handled the *Chicago Journal of Commerce*. The latter paper sought an injunction against such restraint and damages. In this case [55] it was held that inasmuch as the newspaper is a private business it has freedom to contract for the sale of its papers with whom it may please and that the *Tribune* has a legal right to refuse to sell to any dealer for whatever reason it may desire. In Philadelphia Record Co. v. Curtis-Martin Newspapers,[56] the *Record* sought to compel the *Philadelphia Inquirer*

[52] 215 Iowa 1276, 1281, 247 N.W. 813, 87 A.L.R. 975 (1933).

[53] 170 La. 3, 127 So. 345 (1930).

[54] 170 La. 3, 4, 127 So. 345 (1930).

[55] Journal of Commerce Pub. Co. v. Tribune Co., 286 F. 111 (C.C.A.Ill.) 1922).

[56] 305 Pa. 372, 157 A. 796 (1931). See also Fisher v. News-Journal Co., 21 A.2d 685 (Del.Ch.1941); Miller v.

and the *Philadelphia Public Ledger* to sell their "bulldog" editions to a specified group of vendors with whom they had no contractual relations. While the lower court gave the relief sought to the *Record,* the Pennsylvania Supreme Court reversed the decision, stating, "Inasmuch as the publication and sale of newspapers is a private enterprise and corporations carrying on such a business are not in any sense public service corporations, such an order challenges attention to discover legal warrant for its making." [57]

Further leading cases holding that the newspaper is a private business and brief statements from the opinion in each case are as follows:

Mack v. Costello: [58] The publication of a newspaper is strictly a private business. It may be begun or discontinued at the will of the publisher. The publisher in publishing a newspaper, assumes "no office, trust, or station," in a public sense, or enters into any public or contractual relation with the community at large. It may be that the publishing of a newspaper is a quasi public business; but, if so, it is only because, from long existence, it is regarded as a public necessity. But as much might be said of the hardware or grocery business, and yet no one would contend that a grocer or hardware dealer could be compelled by mandamus to sell his wares if he preferred to keep them on his shelf.

Commonwealth v. Boston Transcript Co.: [59] Publishers of newspapers are subject, of course, to reasonable legislative regulations like all other citizens. Statutes in the interest of the public health, morals, safety and welfare affecting them are on the same footing as those affecting the generality of citizens. * * * They have so special immunities. They are entitled to invoke constitutional guaranties in common with others.

It cannot be said * * * that newspapers are affected with a public interest so as to stand on a less favorable ground with respect to legislative regulation * * * than the ordinary citizen.

In Re Wohl, Inc.: [60] A newspaper is not at the common law a business clothed with a public interest.

Uhlman v. Sherman [61] holds to the contrary, but this case is not generally accepted as authoritative.

Post Pub. Co., 266 Pa. 533, 110 A. 265 (1920).

[57] 305 Pa. 372, 374, 157 A. 796 (1931).

[58] 32 S.D. 511, 515, 143 N.W. 950, Ann.Cas.1916A, 384 (1913).

[59] 249 Mass. 477, 484, 144 N.E. 400, 35 A.L.R. 1 (1924).

[60] 50 F.2d 254, 257 (D.C.Mich.1931).

[61] 22 Ohio N.P., N.S., 225, 31 O.D. 54 (1919).

Another line of cases maintains that newspapers do not have to accept legal advertising, affirming further the position that a newspaper is a private enterprise. Several citations and corresponding opinions in part are as follows:

> Wooster v. Mahaska County:[62] It is true, the law provided that certain papers should be designated as official papers of the county, and this without any discretion on the part of the board; but neither the legislature nor the board could compel any paper to publish the proceedings, no matter what compensation might be fixed therefor, and, if the plaintiff was not satisfied with the rate fixed by the board, he was under no obligation to do the work.
>
> Lake County v. Lake County Publishing & Printing Co.:[63] The statute provided for no other publication of a delinquent list. The printer is at liberty to publish or not, but if he does publish it he is bound by the statutes, which provide that his pay shall be the amount of fees allowed by law for publishing the list and notice.
>
> Belleville Advocate Printing Co. v. St. Clair County:[64] When the lists in question were tendered to defendant in error for publication it was at liberty to publish or not, but if it did publish them it was bound by the statute providing for such publication.

In keeping with a private business built up with individual planning and enterprise, a newspaper may refuse to publish a news story.[65]

It should be observed that under the weight of authority of the foregoing rulings, a newspaper may refuse to publish liquor advertising even though it is not illegal so to publish. Under the usual conditions, a newspaper would have no reason to refuse to accept advertising contracts, and likely would not do so; however, it clearly has the legal authority to refuse subscriptions or advertising. Under the guaranties of freedom of the press, it may select that news which it regards as important; there is no legal penalty for the omission of any particular news.

The question arises whether a press association furnishing news service to member papers is private business, or a business impressed with a public interest. The court, in Munn v. Illinois,[66] in holding grain elevators a business in the public interest stated:

[62] 122 Iowa 300, 301, 98 N.W. 103 (1904).

[63] 280 Ill. 243, 246, 117 N.E. 452 (1917).

[64] 336 Ill. 359, 365, 168 N.E. 312 (1929).

[65] Reeda v. Tribune Co., 218 Ill. App. 45 (1920).

[66] 94 U.S. 113, 126, 24 L.Ed. 77

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.

Railroads, electric light companies, and water companies are commonly regarded as public utilities and must serve all who apply under like conditions. Telegraph and telephone companies are also regarded as public utilities.

Press association services, like the Associated Press, International News Service, and United Press are valuable communication services. The Associated Press is a cooperative non-profit association for the benefit of member newspapers; both the United Press and the International News Service are private corporations which serve clients under contract for service.

In Inter-Ocean Pub. Co. v. Associated Press,[67] it was held that the Associated Press was impressed with a public interest; the court's opinion stated in part:

> Its (A.P.) obligation to serve the public * * * grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto.

Substantially the same conclusion was reached in News Pub. Co. v. Associated Press.[68]

It is submitted, despite the holdings in the two foregoing cases, that a newspaper is not necessarily dependent upon any one news service; it has the choice of three such services and so no monopoly exists. The news services have been developed for the benefit of their respective members or clients and there would seem no reason on principle why such services should be declared public utilities. Different jurisdictions might hold differently.

In 1942 upon complaint of the *Chicago Sun* the United States Department of Justice brought suit against the Associated Press, its directors, and a number of member newspapers under the anti-trust laws, charging that the Associated Press is a monopoly

(1876); see also New York & Chicago Grain & Stock Exchange v. Board of Trade, 127 Ill. 153, 19 N.E. 855, 2 L.R.A. 411, 11 Am.St.Rep. 107 (1889).

[67] 184 Ill. 438, 451, 56 N.E. 822, 48 L.R.A. 568, 75 Am.St.Rep. 184 (1900).

[68] 114 Ill.App. 241 (1904).

and an unlawful combination in restraint of trade. This suit was started after the Associated Press refused to admit the *Chicago Sun* to membership. If any newspaper could belong to the Associated Press, and if every newspaper not able to effect a membership under the normal rules and long established by-laws of the association could become a member under regulations established by the government, there might be little use for another association like the United Press or the International News Service, except for supplementary service. The danger to the press as a free institution and a private enterprise would be great. Democratic government would be bound to suffer.

The following comment was prepared by the author of this text book for the Associated Press:

> The press association is the long arm of the newspaper. It is an instrumentality for extending the news gathering function of the press. The law which affects the press association adversely reflects such regulation indirectly on the newspapers themselves. Any interpretation of the law that injures the press association as an organization does certain damage to the newspaper membership or clientele of the press association.
>
> It has been established by constitutional mandate and judicial decision that Congress will make no law that will restrict freedom of the press. To restrict the press association inequitably restricts the newspapers; it tends to smother or cloud freedom of the press.
>
> The newspaper is a private business; it has freedom of contract the same as any citizen or corporation. While the newspaper is subject to the regulations of the general law so far as such regulations apply to all persons or corporations, regulations that restrict the purely journalistic functioning of the press are a distinct threat to freedom of the press.
>
> If several farmers wish to pool their interests in buying a threshing machine for their mutual benefit, they have a right to do so; they possess freedom of contract so long as their contracts are not for an unlawful purpose. The farmer who is not invited into this cooperative effort is denied the benefits of this pool but there is no penalty on those who are members. What is true of the farmer is true for certain other interests, whether these are proprietorships, partnerships, corporations or associations.
>
> If an inventor wishes to protect his ideas, he may apply for a patent; if an author wishes to profit from his writings, he may apply for a statutory copyright. Both patents and copyrights are monopolistic. They both give exclusive rights for a term of years. Our constitutional fathers believed that such benefits encouraged progress; the years have justified their reasoning.

The Associated Press, a cooperative association of newspapers, has been charged as unduly restricting the press. It has been charged that the Associated Press limits its membership. Do not farmers or merchants, do not social organizations, clubs or fraternities limit their membership? They need not take in all who apply. Does an association of newspapers have to take in all who apply?

The answer has social as well as legal aspects. Is society injured by a large cooperative press association? Is society injured because in a certain city a newspaper does not print some minor story, not considered newsworthy by its editors?

The individual citizen is not restricted because of an exclusive newspaper in a particular city. That citizen can subscribe to papers in nearby cities; he can read magazines, and he can listen to the radio.

Is a newspaper not a member of the Associated Press denied world news? The facts speak for themselves. Both the United Press and the International News Service offer national coverage. A non-member A.P. paper may take any number of special press services. He is free in his own state to build up special correspondent contacts.

Both the telegraph and the telephone are channels of communication; as such they are practical monopolies or public utilities. The press association, on the contrary, is a fact-finding organization developed for the distribution of news gathered for the benefit of member newspapers and the public.

The press association as the long-arm of the press takes directions from the many editors whose papers are members. It searches, it verifies, it reports; it builds up factual presentations and research material on which editorial policies of various member papers may be made.

If there were but one press association for all, there would be a threat to democratic government. One press association for the U. S. would mean monopoly. The Associated Press in a particular instance may deny membership to a certain newspaper; but that certain newspaper has other press associations available.

Monopoly is a word perhaps clear in conception but cloudy in application. Any owner of property has a monopoly on that property. So long as the owner does not injure others because of this monopoly of ownership, no wrong has been committed.

A monopoly may be beneficial or otherwise. The A.P. may be a monopoly as to certain non-member newspapers, but it is not such a monopoly that injures the public. The public can obtain its news from any one of a number of sources. Any possible injury to the non-member newspaper is no more an injury than the monopoly in the ownership of a particularly valuable piece of property at the corner of 42nd street and Broadway.

It is certain that if the A.P. or any other press association is forced by the government to be a monopoly, the injury to the public would be great. To make any press association a monopoly so that no other press association could exist would be to place in the hands of bureaucracy in an increasingly centralized government a weapon to choke the channels of news; it would be a ruling minority's chance to hold back facts of inefficiency: it would tend to prevent fair comment on government.

Any democracy needs competitive press associations; in numbers there is insurance that truth in public affairs will be made known.

§ 27. RADIO COMPETITION

Broadcasting stations must observe equitable rights in the quasi property of news.

Radio barks at journalism; the legal repercussions of this conflict affect both instrumentalities of publicity. Within the last two decades radio, a new industry, has stepped into the journalistic horizon, finding a permanent place for itself and performing some functions formerly thought belonging largely if not exclusively to the newspaper as an institution.

While the radio has taken the edge off the newspaper's function of giving so-called spot news, it does have definite limitations. Radio has a definite time dimension; it has little reference or record value to the listener. The newspaper can give news more completely; so far as pictures, cartoons, and certain types of entertainment features are concerned the newspaper may be regarded as superior to the radio.

The commercial development of radio has taken over some of the functions of the newspaper in that the radio station or chain sells advertising time and broadcasts spot news, human interest news features, and entertainment. The radio is thus brought into competition with the newspaper.

Journalism as expressed by the newspaper finds radio a healthy competitor which the newspapers recognize; however, the newspaper publishers believe that in some phases of news distribution, radio helps the newspaper. It is at least true that with the great commercial development of radio, metropolitan newspaper circulation volume, in general, has been sustained.

The truth is that with all respect to the wonders of radio, he who has eyes will continue to read. It is as fundamental as

life itself that the intelligent man or woman will continue to want a period for quiet reading. The problem for the newspaper publisher is to produce an editorial product that reaches effectively into his community, and then reflect upon a sentence credited to Schopenhauer that "noise is the true murderer of thought."

Radio has not been equipped to gather news, as have the newspapers with their affiliated press associations, such as the Associated Press, the United Press, and the International News Service. This difficulty is being remedied, however, although it is not within the province of this study to discuss that phase of the radio question.

Legally, the competition between broadcasting of news and the publishing of printed news in the newspaper has arisen in the case of the Associated Press v. KVOS, Inc.;[69] this case was originally decided for the radio station, but in the circuit court of appeals for the Ninth Circuit, the district court decision was reversed.

The basis of the circuit court of appeals decision was largely on the authority of International News Service v. Associated Press[70] decided in 1918, and Herbert v. Shanley Co.,[71] both of which cases dealt with the rights as to intellectual products, the former as to rights in news stories and the latter as to rights in musical productions.

The United States Supreme Court, in a decision handed down Dec. 14, 1936, reversed the decision of the circuit court of appeals for the Ninth District. The basis for this reversal was that inasmuch as the Associated Press is a corporation not for profit it is not legally capable of sustaining damages and so could have no standing in the Federal district court. The bill for injunction against news pirating was therefore dismissed inasmuch as the damages were not proved to exceed the jurisdictional sum of $3000, exclusive of costs and interest.

A radio station's appropriation of news reports after publication in a newspaper is the vital problem in the Associated Press v. KVOS case. So far as appropriation of news stories by one press association from another press association, the question was settled in the International News Service v. Associated Press case.

[69] 80 F.2d 575 (C.C.A.Wash.1935).

[70] 248 U.S. 215, 39 S.Ct. 68, 63 L. Ed. 211, 2 A.L.R. 293 (1918).

[71] 242 U.S. 591, 37 S.Ct. 232, 61 L. Ed. 511 (1917).

It is of at least persuasive authority, on the basis of this case, that appropriation of news by one newspaper from another would be similarly enjoined. Appropriation of news by a radio station from a newspaper or press association is a new problem, some possibilities of which have not been concluded in the Associated Press v. KVOS case.

In the KVOS case there was admitted the appropriation of news, the broadcasting of the same, and its destructive effect on the press, when the station moved to dismiss the action; the excuse was that its taking and circulation by means of ether waves was wholly eleemosynary. The circuit court of appeals on its ruling on the substantive side of the case held however that this contention was not valid.

> Common sense compels us to agree with the complainant that the purloining of complainant's fresh news and its circulation in KVOS' "Newspaper of the Air" are both elements of a business of publication for profit. This profit is to be gained through widening its circulation at the expense of the circulation of the Associated papers. Complainant's news is not only made stale to those of their readers who first have access to the "Newspaper of the Air," but also is made free, while still hot, to their readers who pay a usual subscription price for their papers. The obvious tendency of these factors is to cause complainant's papers to lose circulation and with it advertising volume which is based on circulation. We are unable to see any theory under which such a diversion of advertising income from the Associated papers to KVOS, with its incidental destruction of subscriber income, can be called anything but "unfair competition." [72]

A further defense was made on the ground that the acts of the defendant were not for profit. This type of defense was given consideration in the significant case of Herbert v. Shanley Co.[73] In this case the wrong alleged was the infringement of copyright of a musical composition. The facts were that one of Victor Herbert's compositions was played in connection with the serving of meals at a public restaurant. The defense was that there was no charge for the music and so that there was no profit made on the playing of such composition or compositions. The defendant's position was essentially that the music was entirely incidental and that it was given away, without any charge whatsoever to the patrons of the restaurant.

[72] Associated Press v. KVOS, Inc., 80 F.2d 575, 582 (C.C.A.Wash.1935).

[73] 242 U.S. 591, 37 S.Ct. 232, 61 L. Ed. 511 (1917).

This contention, however, was held unsound. The court stated:

> The defendant's performances are not eleemosynary. They are a part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit, and that is enough. [74]

Although the recent case of Associated Press v. KVOS was decided adversely to the press association, the decision was based on procedural grounds, and the substantive law as defined by such cases as International News Service v. Associated Press and Herbert v. Shanley Co., still continues to be valid law, although the interjection of the radio problem brings new elements into the picture; it would seem, however, that deliberate lifting of news collected by newspapers and press associations as instrumentalities of the newspapers would clearly be unfair competition, at least if broadcasting of news is made during the time when the news has commercial value.

Two economic developments obtain, however, to offset the difficulty of radio-newspaper competition. One is the practice of newspapers to own their own radio stations despite some agitation to charge such a relationship to be monopolistic. The other is the arrangement whereby the news for radio broadcast is in part obtained through the established press associations.

§ 28. ACCESS TO PUBLIC RECORDS

The right to inspect public records depends upon common law principles modified by statutory regulation.

An official writing concerning an official act of a public body or public officer is regarded as a public record when the record is required by law as a memorial of a thing said or done in the discharge of a duty imposed by law.[75] The requirements of a

[74] 242 U.S. 591, 594, 37 S.Ct. 232, 61 L.Ed. 511 (1917).

[75] Robison v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A.1917B, 1179, Ann.Cas.1913B, 1271 (1911).

public record are that such records be accurate and durable [76] and that they be kept in safe custody so that the information contained may be disseminated to the public concerned.[77]

Subject to certain conditions established at common law and public policy, unless provided otherwise by statute, public records are open for free inspection of any citizen.[78] Statutes regarding the inspection of municipal records should be liberally construed in favor of the taxpayers.[79]

The right to inspect public records is a qualified right; [80] at common law there was no vested right in general to inspect public records. There was at common law the right to inspect public executive, legislative, and judicial records, provided that the person seeking to inspect the records had an interest or sufficient reason for such inspection, and provided that the inspection did not interfere with the public interest.

Neither the individual citizen as such nor a newspaper reporter possesses an unqualified right to demand access to papers, documents and books of a public office, despite the fact that such records may be the property of the public and held and filed for the benefit of the government.

To a person demanding the right to inspect records in a county clerk's office, it was held in Payne v. Staunton,[81] that such person must show an interest in the subject concerned and establish that he has a legitimate purpose in making such an inspection.

While at common law there was no vested right in the inspection of public records, it would seem that the public in a democracy or in the republican form of government would have the right generally to inspect public records. Such was the

[76] People ex rel. Armknecht v. Haas, 311 Ill. 164, 142 N.E. 549 (1924).

[77] People ex rel. Stenstrom v. Harnett, 131 Misc. 75, 226 N.Y.S. 338 (1927), aff., 224 App.Div. 127, 230 N.Y.S. 28, aff., 249 N.Y. 606, 164 N.E. 602 (1928).

[78] State ex rel. Newby v. Elsworth, 61 Neb. 444, 85 N.W. 439 (1901); State v. Keller, 143 Or. 589, 21 P.2d 807 (1933); Barnard v. Dunham, 191 Mich. 567, 158 N.W. 202 (1916).

[79] Birenbaum v. Carey, 175 Misc. 351, 22 N.Y.S.2d 722 (1941).

[80] Brewer v. Watson, 71 Ala. 299, 46 Am.Rep. 318 (1882); In re Cincinnati Enquirer, Fed.Cas.No.2,719 (1879); In re McLean, Fed.Cas.No.8,877, 2 Flip. 512 (1879); Mushet v. Department of Public Service of City of Los Angeles, 35 Cal.App. 630, 170 P. 653 (1918); North v. Foley, 238 App.Div. 731, 265 N.Y.S. 780 (1933); State ex rel. Holloran v. McGrath, 104 Mont. 490, 67 P.2d 838 (1937); Fayette County v. Martin, 279 Ky. 387, 130 S.W.2d 838 (1939).

[81] 55 W.Va. 202, 46 S.E. 927, 2 Ann. Cas. 74 (1904).

opinion in People ex rel. Stenstrom v. Harnett,[82] which noted in part the following:

> In the case of public records, strictly speaking, all citizens have a right to resort to them irrespective of their motives or interest. They may examine them to satisfy mere curiosity, or they may take transcripts from them for sale. * * * In the absence of statute, the nature and purpose of the record, and possibly, custom and usage, must be the guides in determining the class to which it belongs.

This opinion is broad, but it is founded on the *general* right of the public to know what its government is doing; it is quite different as to the right of the individual citizen to demand the opportunity to inspect and copy from the records. While by statute any citizen may inspect public records, the clear right to do so depends upon the interest which the particular citizen possesses at the time he wishes to make the inspection. Such an inspection must not be detrimental to the public interest or unnecessarily inconvenience the officials in charge of the records. As stated in the aforementioned case, "it would be a startling proposition to public officers, and to the public as well, if they were informed that all citizens had the right, in the absence of statute to the contrary, to search the files and records of all public officers, as it might suit their fancy. * * * Any person who has an interest in such record or document should ordinarily be permitted to inspect it, unless its inspection would obviously be detrimental to public interest."

It must be realized that the time element is involved. When a court is deliberating its conclusions, and even after a decision has been reached, the press or an individual citizen is not entitled to know the final result until the decision has been announced. Likewise, the deliberations of an administrative body are not usually open although public hearings may be covered by the press. Records and documents assembled as evidence, though for the public benefit, are not considered public records, unless they are made a part of the final, publicly announced decision.

The administrative routine of the Federal or state government, its correspondence, and its internal procedures are not usually open for instant inspection; the ultimate results may

[82] 131 Misc. 75, 226 N.Y.S. 338, 341, 342 (1927), aff., 224 App.Div. 127, 230 N.Y.S. 28, aff., 249 N.Y. 606, 164 N.E. 602 (1928); see also Evanston v. Gunn, 99 U.S. 660, 25 L.Ed. 306 (1879).

be open for inspection, but the material in process and compilation is clearly not a public record.

In Marbury v. Madison,[83] the court stated that the attorney general would not be required to reveal anything that in his opinion had been communicated to him in confidence.

The records of the county clerk have been held open as public records.[84] It is submitted that the records which are open are the finally completed records, not supplementary memoranda and correspondence in the routine operation of the office. In State ex rel. Holloran v. McGrath,[85] in which it was held that petitions for a referendum were public records, the court stated:

> The right to inspect is always subject to reasonable regulations, but it must also be borne in mind that such regulation must be reasonable and not of such arbitrary nature as to in effect deny to the applicant the right granted him by law.

Court records in the office of the clerk of court are considered open for inspection[86] including fee books kept by clerks of district courts,[87] and judgment and mechanic's liens.[88] The judgment record of a justice of the peace is a public record,[89] as well as the books of a notary public in which he keeps the minutes of his official proceedings,[90] and the books of a township trustee.[91]

Records of land titles, transfers, and mortgages on lands and its improvements are public records, open for inspection.[92] Maps of subdivisions likewise are open for public inspection when such maps and plat records are part of the records of a county or city;[93] however, it was held in Cormack v. Wolcott,[94] that a mandamus was denied to a person who wanted to copy the entire records for the purpose of making private books for his own speculative purposes.

[83] 1 Cranch 137, 144, 2 L.Ed. 60 (1803).

[84] Haner v. Bend Pub. Co., 118 Or. 105, 244 P. 868 (1926).

[85] 104 Mont. 490, 499, 67 P.2d 838 (1937).

[86] State ex rel. Clark v. Long, 37 W.Va. 266, 16 S.E. 578 (1892).

[87] State ex rel. Griggs v. Meeker, 19 Neb. 106, 26 N.W. 620 (1886).

[88] Boylan v. Warren, 39 Kan. 301, 18 P. 174, 7 Am.St.Rep. 551 (1888).

[89] State ex rel. Newby v. Elsworth, 61 Neb. 444, 85 N.W. 439 (1901).

[90] Phillips v. Poindexter, 18 Ala. 579 (1851).

[91] Anderson School Tp. v. Thompson, 92 Ind. 556 (1883).

[92] State ex rel. Cole v. Rachac, 37 Minn. 372, 35 N.W. 7 (1887); Leonard v. Benford Lumber Co., 110 Tex. 83, 216 S.W. 382 (1919).

[93] Miller v. Murphy, 78 Cal.App. 751, 248 P. 934 (1926).

[94] 37 Kan. 391, 15 P. 245 (1887).

Tax assessments, payments, records, and disbursements of tax funds are clearly public records. In Burton v. Tuite, City Treasurer of Detroit,[95] the court stated that a city can have no private books, not open to inspection by those having such right, if reasonable rules are observed. In State ex rel. Wellford v. Williams,[96] the court pointed out that taxpayers may see the books, papers, and vouchers so that its financial condition may be observed. The audit of records of the sheriff and collector in reference to the collection and disbursement of tax money was held a public record in Collins v. State,[97] and the state land tax book in a county treasurer's office was held to be open for inspection in Aitcheson v. Huebner.[98] Records of accounts of the state auditor were held public records in Brewer v. Watson;[99] and in Nowack v. Fuller,[100] it was held that a newspaper publisher has such an interest in public affairs that he can inspect the records of the auditor general of the state. In People ex rel. Brownell v. Higgins,[101] a legal opinion concerning a proposed bond issue was a public record.

Federal income tax records are considered public records;[102] they are however open to public examination and inspection only as authorized in rules made by the President. Under the regulations indiscriminate use of the records is not permitted. Although regulations vary in states having income taxes, it would seem that generally they are not open for public inspection.[103] Wisconsin income tax records are by statute considered public records, open to inspection.

The New York income tax records are secret except in certain specified cases. California, Massachusetts, Minnesota, and Pennsylvania have statutes similar to New York.

Books of a municipal corporation are generally regarded as open for inspection provided a person has a reasonable interest in the information sought and is willing to observe fair rules

[95] 78 Mich. 363, 44 N.W. 282, 7 L.R.A. 73 (1889).

[96] 110 Tenn. 549, 75 S.W. 948, 64 L.R.A. 418 (1903); see also Michigan City v. Marwick, 67 Ind.App. 294, 116 N.E. 434 (1917).

[97] 200 Ark. 1027, 143 S.W.2d 1 (1941).

[98] 90 Mich. 643, 51 N.W. 634 (1892).

[99] 71 Ala. 299, 46 Am.Rep. 318 (1882).

[100] 243 Mich. 200, 219 N.W. 749, 60 A.L.R. 1351 (1928).

[101] 96 Misc. 485, 160 N.Y.S. 721 (1916).

[102] 26 U.S.C.A. Int.Rev.Code, § 55.

[103] Information furnished through the courtesy of Commerce Clearing House, Inc., Chicago, Illinois.

specifying care of records and time of inspection.[104] It has been held that the records of a municipal electric plant,[105] city operated docks and terminals,[106] a water supply commission,[107] and a department of conservation are open for inspection.[108] It was held, however, in People ex rel. Scweller v. Prendergast,[109] that the comptroller's office cannot be used as a clearing house to assist a money lender in determining whether employees credit was impaired by garnishee orders; a petition for mandamus to force such inspection was accordingly denied.

The citizen has an interest in the conduct of municipal boards handling large construction projects or directing public business in furnishing utilities to a city. That a citizen may inspect such records in New York is clearly established. In Egan v. Board of Water Supply of City of New York,[110] the court stated:

> This is not an attempted inquisition into the business affairs of a private corporation. It is an inquiry into the manner in which the public business has been done—an endeavor to ascertain what grounds and for what reasons a body of public officers charged with the duty of awarding a contract for a vast public engineering work have departed from the ordinary and usual practice of awarding the contract to the lowest responsible bidder, and have thus imposed upon the people a heavier pecuniary burden than was necessary. * * * It may not be denied that there are papers concerning governmental matters which are properly treated as secret and confidential, such for example as diplomatic correspondence and letters and despatches in the detective police service or otherwise relating to the apprehension and prosecution of criminals.

Records of licenses issued for various purposes, it would seem, are public records, according to the better reasoned view of the courts. Such records include, for example, marriage, dog, hunting, fishing, liquor, tavern, dance hall, beauty shop, bicycle, and motor car licenses.[111] In regard to automobile registrations,

[104] North v. Foley, 238 App.Div. 731, 265 N.Y.S. 780 (1933).

[105] Mushet v. Department of Public Service of City of Los Angeles, 35 Cal.App. 630, 170 P. 653 (1918).

[106] State ex rel. Cummer v. Pace, 118 Fla. 496, 159 So. 679 (1935).

[107] Egan v. Board of Water Supply of City of New York, 205 N.Y. 147, 98 N.E. 467, 41 L.R.A.,N.S., 280, Ann. Cas.1913E, 56 (1912).

[108] State ex rel. Wogan v. Clements, 192 So. 126 (La.App.1940).

[109] 89 Misc. 584, 153 N.Y.S. 699 (1915).

[110] 205 N.Y. 147, 157, 98 N.E. 467, 41 L.R.A.,N.S., 280, Ann.Cas.1913E, 56 (1912).

[111] Kalamazoo Gazette Co. v. Vosburg, 148 Mich. 460, 111 N.W. 1070 (1907); State ex rel. Ferry v. Williams, 41 N.J.L. 332, 32 Am.Rep. 219

the court in Direct Mail Service, Inc. v. Registrar of Motor Vehicles,[112] pointed out that the object of the statute on motor car registration was to make available accurate information on ownership and responsibility of persons operating automobiles.

In an early case, Commonwealth v. Rodes,[113] it was stated that a marriage license or bond is not a record. That case concerned a criminal action for changing the date on a marriage license. It should be pointed out that the license itself in the hands of the licensees becomes their property, but that the record of the issuance of the license held in the office of the issuing officer becomes the permanent record of the legal permit to marry.

Election records, so far as the poll books and final results are concerned, are public records,[114] but the records relating to the printing and certification of ballots, and the ballots themselves are not public records. The election officials may be said to hold such property in trust for the people.[115] In Harrison v. Powers,[116] it was held that a school census was a public record.

The publisher of a newspaper, it has been held, has at least the same interest in the public records as does any citizen and moreover has a special interest in printing news contained in the public records, a function which is one foundation of the business of newspaper publishing, that is, in issuing news in printed form, for copies of which a revenue is obtained.

Essentially, public records may be divided into the following classifications:

1. Public laws (statutes).
2. Records of completed court proceedings, both civil and criminal.
3. Titles to real property.
4. Election results.
5. Revenues, tax and fee records.
6. Official acts of public officials and administrative bodies when such acts concern major policies and decisions of which the public should be given notice.

That a newspaper publisher has a sufficient interest in public records to warrant his inspection and utilization of such facts

(1879); Direct Mail Service, Inc. v. Registrar of Motor Vehicles, 296 Mass. 353, 5 N.E.2d 545, 108 A.L.R. 1391 (1937).

112 296 Mass. 353, 5 N.E.2d 545, 108 A.L.R. 1391 (1937).

113 31 Ky. 595, 1 Dana 595 (1833).

114 State ex rel. Thomas v. Hoblitzelle, 85 Mo. 620 (1885).

115 Gleaves v. Terry, 93 Va. 491, 25 S.E. 552, 34 L.R.A. 144 (1896).

116 19 Cal.App. 762, 127 P. 818 (1912).

therefrom as necessary for informing the public was held in an Alabama case.[117]

Courts have held generally that newspapers have no special legal privileges not possessed by any individual citizen. A newspaper or a citizen is free to comment, or to report events, as to the facts to which he may have access. If a citizen has a special interest in some public record he may, under the common law rule, inspect the record; likewise a newspaper having a pecuniary interest in a particular public record, so that in the public interest the information may be given as news or as the basis for editorial comment, may inspect the public record; such a right has a foundation in the common law and in some jurisdictions may be further protected by statutory enactment.

The newspaper's special interest as a basis for the right to inspect public records was clearly asserted in the significant case of Nowack v. Fuller.[118] The statement of facts reveals that the plaintiff was publisher of the *Michigan Digest* and that he endeavored to inspect the records of the auditor general of the State of Michigan relative to the expenditure of public funds. The defendant denied him access to the records, with the result that the publisher brought an action of mandamus in his own name against the state official. The court held that a writ of mandamus should be ordered, if necessary.

The court's opinion emphasized that a newspaper publisher has such an interest in the records that, under the Michigan law, he can begin the proceedings in his own name.

At common law it would seem that citizens *in general* have a right to inspect public records; however, the individual citizen exercising his right as such should enforce his right through the attorney general who would begin mandamus proceedings in behalf of the petitioner; if an individual citizen wishes to inspect the public records and possesses an interest in such records, he may bring the proceeding in his own name.

Statutes however may either supplement or replace the common law relative to access and inspection of such records. In Bend Pub. Co. v. Haner,[119] the Bend Pub. Co., publisher of the *Central Oregon Press,* sought a writ of mandamus to compel J. H. Haner, clerk of the county and circuit court of Deschutes County, to give the agents of the publishing company access to

[117] Holcombe v. State ex rel. Chandler, 240 Ala. 590, 597, 200 So. 739 (1941).

[118] 243 Mich. 200, 219 N.W. 749, 60 A.L.R. 1351 (1928).

[119] 118 Or. 105, 244 P. 868 (1926).

the records in his custody. The clerk had refused to grant such inspection to the petitioner. Upon hearing the petitioner, the court overruled the defendant's demurrer, thus affirming the right of a newspaper publisher to inspect public records. In this case, the court based the authority for its decision upon the Oregon statute, Chapter 98 of the General Laws of Oregon 1909, entitled:

> An act to provide for the free inspection of all state, county, school, and town records or files by all persons; and for the making of abstracts or memoranda therefrom.

The following interpretation of the foregoing statute was made by the court in announcing its decision:

> That the Legislature possessed the power to enact a law granting to any person, for any lawful purpose, free access to the clerk's office in order to inspect and examine the records in his custody is beyond question. .
>
> To those persons only who have occasion to examine the records for some lawful purpose, and not from mere curiosity, will a writ of mandamus be granted.[120]

Many records maintained by various phases of government are not clearly public records in the strict sense. For example, the record of the jury roll is not a public record open to inspection. On the basis of public policy, such a record could not well be open to all citizens. In State ex rel. Denson v. Miller,[121] the court stated:

> * * * To know the names upon the jury roll is to know the names within the jury box, and that such knowledge, in the hands of interested and unscrupulous persons, may result in serious evils in the administration of justice by jury trial, is hardly open to doubt.

On principles of public policy based upon either common law or statute, police records are generally closed for inspection by the public. In re Zeigler,[122] the court's opinion in part was as follows:

> The reports of the police department made by police officers are not public records. * * * The records of the police department are specially exempted from the provisions of the statute requiring that copies of any book, paper, or report may

[120] 118 Or. 105, 108, 244 P. 868 (1926).

[121] 204 Ala. 234, 235, 85 So. 700 (1920).

[122] 122 Misc. 351, 203 N.Y.S. 19, 20 (1924).

> be obtained from the heads of all departments upon demand. * * * They are essentially confidential, relating to the apprehension and prosecution of criminals. This, also, is true of the records of the office of the medical examiner.

The theory of the public policy making police records not open to the public was well stated in Worthington v. Scribner,[123] as follows:

> It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised, according to its views of what the interests of the public require.

In Payne v. Staunton,[124] the plaintiff was not given the right to inspect certain records of the county clerk, because his purpose was to gather evidence for a criminal prosecution. The court noted that citizens cannot meddle in prosecuting crime but that they should proceed through the regular channels of the grand jury or criminal process. In the same vein, the Wisconsin Supreme Court upheld the refusal of the state fire marshal to reveal information on investigations in the course of his business.[125] A petition for mandamus was denied in Runyon v. Board of Prison Terms and Paroles,[126] on the ground that letters and communications to the state board supervising prison terms and paroles were not public records.

Records maintained to shed light on the worthiness of persons applying for pawnbroker license renewals have been held not to be public records even though they are open to the police to aid them in detecting crime.[127]

The police blotter, it was held in Hale v. City of New York,[128] is not a record open to the public, except on consent of the police commissioner, despite a statute which declares that a municipal-

[123] 109 Mass. 487, 488, 12 Am.Rep. 736 (1872).

[124] 55 W.Va. 202, 46 S.E. 927, 2 Ann.Cas. 74 (1904).

[125] State v. Freedy, 198 Wis. 388, 223 N.W. 861 (1929).

[126] 26 Cal.App.2d 183, 79 P.2d 101 (1938).

[127] Round v. Police Com'r for City of Boston, 197 Mass. 218, 83 N.E. 412 (1908).

[128] 251 App.Div. 826, 296 N.Y.S. 443 (1937).

ity's public records are open to inspection. On the contrary, it was held in Lee v. Beach Pub. Co.,[129] that police books and records are open, although it was emphasized that the right of inspection does not extend to all public records; the court granted a permanent injunction against illegal interference with the newspaper in gathering news of general interest.

While the statements made by police officers and detectives are definitely not privileged, there is a tendency to hold that a report of a correct record at the police department would be entitled to privilege. In Republican Pub. Co. v. Conroy,[130] the court held consideration would be given to the defense of privilege when the reporter gave merely the facts of arrest and the charge against the person arrested. Privilege was allowed as a defense in Kilgore v. Koen,[131] on the ground that the statements were obtained from the reports of a peace officer. The report of a record of a deputy sheriff was held privileged in Sherwood v. Evening News Assn.[132]

So far as a defendant newspaper is concerned, publication of the fact of an arrest on a definite charge could be defended on the ground of truth; it would usually be published with justifiable ends and good motives, in that the public should know the essential facts of police activities.

The police blotter has no unified legal status; as a public record it is an enigma. If the police blotter, or day-to-day journal of arrests, is a public record, there is some authority to regard that information taken therefrom by a newspaper reporter would be privileged as a record of administrative proceedings and that his newspaper would be protected by qualified privilege in case a libel suit arose as a result of information actually taken from such record. A survey conducted by the University of Wisconsin[133] in 1942–43 revealed the status according to the following of the several state jurisdictions:

> States in which the police blotter is a public record by statute: Georgia,[134] Idaho,[134] Kansas, and Utah.

[129] 127 Fla. 600, 173 So. 440 (1937).

[130] 5 Colo.App. 262, 38 P. 423 (1894).

[131] 133 Or. 1, 288 P. 192 (1930).

[132] 256 Mich. 318, 239 N.W. 305 (1931).

[133] Survey by Walter A. Steigleman and Frank Thayer of the faculty of the School of Journalism, University of Wisconsin.

[134] Although the laws in these two states seem clear, courts may question whether municipal police records fall into the category of these statutes.

States in which the police blotter is considered a public record by an unofficial opinion or belief of the attorney general: Alabama,[135] Florida, Iowa, Kentucky, Minnesota, North Carolina, Oklahoma, and Washington.

States in which the police blotter is determined by municipal ordinance: Arizona, Pennsylvania, Tennessee, Texas, Washington,[136] and West Virginia.

States in which the police blotter is not regarded as a public record because of statute: Connecticut,[137] Louisiana, and South Dakota.

States in which the police blotter is not considered a public record by unofficial opinion or belief of attorney general: Michigan, Montana, Ohio, Rhode Island, South Dakota, and Wisconsin.

States in which the police blotter is not a public record on the ground of court decision: Massachusetts and New York.

States in which status never was raised, no statute court decisions or opinions of attorney general: Arkansas, California, Colorado, Delaware, Illinois, Indiana, Maine, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, South Carolina, Vermont, Virginia, and Wyoming.

§ 29. THE RIGHTS TO REPORT AND COMMENT

Liberty to publish news depends upon the right to gather the potential news facts; liberty to comment depends upon constitutional authority for the expression of sentiments, basic facts, and fair and reasonable interpretation of such facts.

The right to report is of course dependent upon the ability to gather news. Obviously, the United States Constitution does not give one the specific right to collect news; however, there is no prohibition; the several state constitutions give no more than the freedom to speak and to write what one pleases; the right to gather and obtain news, so vital to the press, is granted inferentially. Legally, the rights not granted to the Federal government are reserved to the states or to the people, and so the right to gather news remains with the people.

135 Attorney General bases his belief on two court decisions. Watford v. Lawson, 240 Ala. 468, 199 So. 692 (1940); Holcombe v. State ex rel. Chandler, 240 Ala. 590, 200 So. 739 (1941).

136 Some cities without specific authorization from the state have passed ordinances regulating the police blotter's use.

137 Statute refers only to records of state police.

Much news is gathered because the events so reported are *publici juris* [138] or because individuals cooperate with the reporters; news information in many instances is given voluntarily. But the reporter has no right to inspect governmental records that, in the first instance, are not strictly considered public records. A reporter cannot for example inspect diplomatic correspondence, or correspondence of government officials who are carrying on immediate business, or the records of a police department relating to the apprehension of criminals, or the plans for the prosecution of a criminal case; these are not strictly public records. What constitutes a public record may be specified by statutes of the various jurisdictions.

The reporter has no right to gather news if to do so involves trespass. He cannot enter private property if given notice not to do so; he cannot assault others in order to obtain news; in short, he has no right to break the law in order to obtain information basic for a news story, information which if obtained he is free from previous restraint to write and publish.

The defendant in a criminal prosecution is guaranteed by both the Federal Constitution and the several state constitutions that his trial shall be "public." These guaranties, however, do not give an absolute right to a newspaper to have its representative, or a reporter, present at a criminal trial. "Public" in such guaranties is used in opposition to "secret." [139] While the doors of the court room during a criminal trial are expected to be open and the public admitted, the judge has discretion which he may exercise with due regard to the size of the court room, the presence of objectionable characters, the nature of the trial itself, and interference with the orderly administration of justice.[140]

Such authority in the court is regarded inherent in so far as the punishment for direct contempt of court is concerned. A contempt of the authority or dignity of the court in the court room or so adjacent thereto as would disturb the court or interfere with the administration of judicial duties is a direct contempt.

In U. S. v. Holmes, the court gave the following dictum:

[138] International News Service v. Associated Press, 248 U.S. 215, 39 S. Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293 (1918).

[139] People v. Swafford, 65 Cal. 223, 3 P. 809, 810 (1884).

[140] People v. Hartman, 103 Cal. 242, 37 P. 153, 154, 42 Am.St.Rep. 108 (1894).

> We have, however, the power to regulate the admissions of persons and the character of proceedings within our own bar; and, as the court perceives several persons apparently connected with the daily press, whose object, we presume, is to report the proceedings and evidence in this case, as it advances, the court takes occasion to state that no person will be allowed to come within the bar of the court for the purpose of reporting, except on condition of suspending all publication till after the trial is concluded. On compliance with this condition, and not otherwise, the court will direct that a convenient place be afforded to the reporters of the press.[141]

This problem of a public trial in criminal cases was seriously considered by the eminent jurist and legal authority, the late T. M. Cooley, who stated:

> It is required that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge, and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.[142]

It is clear, then, that the judge is master of the decorum and procedure in his court room. If the nature of the trial demands that only the interested parties in the litigation itself be present, the court may exclude reporters and visitors. In trials for divorce, and in trials for obscenity, juvenile delinquency, and in other trials of a criminal nature, the situation may arise when it is desirable for the trial to proceed without the attendance of the public; reporters may likewise be excluded, although the pertinent results may be given to the press with the permission of the court. In insanity hearings the names of complaining wit-

[141] U. S. v. Holmes, Fed.Cas.No.15,383, 1 Wall.Jr. 1 (C.C.Pa.1842).

[142] Cooley, T. M., Constitutional Limitations (8th Ed.), p. 647.

nesses may be suppressed, and in adoption proceedings the names of the real parents may be impounded.

Findings of the grand jury may be reported by the press following the deliberations on any particular investigation.[143] Newspaper representatives are not entitled to attend the sessions of the grand jury, according to long-established judicial practice, founded upon principles of public policy.[144] If investigations were not conducted in secret there would be a tendency for witnesses and jurors to commit perjury or subornation of perjury, for persons being investigated and later found legally blameless to be injured or their reputations affected adversely, for the guilty to escape, and for a restriction or muzzling of charges on alleged criminal acts.[145]

The right to report, as well as the right to comment, means freedom to obtain basic information. Generally legislative sessions, as already pointed out in Chapter 2, are open to reporters. Administrative bodies are also generally open when sitting as a quasi judicial body. All hearings of the Securities and Exchange Commission are public.[146] Hearings before the Federal Trade Commission or its trial examiners are public. Hearings on complaints issued by the Federal Trade Commission or its trial examiners are public, unless ordered otherwise by the commission.[147] A hearing of the Interstate Commerce Commission, under the Interstate Commerce Commission Act, is open to the public upon the request of any interested party.[148] When hearings may be of value to an enemy of the nation, however, the commission may hold such sessions in private.

Freedom to comment is guaranteed by the Federal and the several state constitutions. Comments must be founded upon fact, be reasonably fair and accurate, and nonmalicious.

[143] Atwell v. U. S., 162 F. 97, 17 L.R.A.,N.S., 1049, 15 Ann.Cas. 253 (C.C.A.N.C.1908).

[144] Bennett v. Stockwell, 197 Mich. 50, 163 N.W. 482, L.R.A.1917F, 761, Ann.Cas.1918E, 1193 (1917).

[145] State v. Branch, 68 N.C. 186, 12 Am.Rep. 633 (1873); see also 24 Am. Jur. 805 § 47.

[146] Section 22, Securities Exchange Act of 1934, 15 U.S.C.A. § 78v; Section 21, Securities Act of 1933, as amended in 1934, 15 U.S.C.A. § 77u.

[147] Rule XII, Rules of Practice, Federal Trade Commission.

[148] Section 17 (3), Interstate Commerce Commission Act, 49 U.S.C.A. § 17(3).

§ 30. RIGHT TO POSTAL PRIVILEGES

Upon meeting conditions, newspapers and other periodical publications may be afforded second-class mail classification which permits rate and distribution advantages.

Publications, either newspapers or periodicals which bear notice of entry as second-class matter, are arbitrarily classified as second-class mail matter.

Upon meeting the prescribed conditions of the United States Postal Regulations, a newspaper or other periodical publication may be afforded second-class mailing privileges. These privileges include two particularly important elements: first, the rate of 1½ cents per pound or fraction thereof for purely editorial material as distinguished from advertising, and a zone rate for advertising; second, free distribution in the county of publication, when prescribed conditions are met.

To obtain entry as second-class matter, a publication must be issued at regular intervals, as frequently as four times a year; it must not be designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.[149]

The conditions upon which a publication may be admitted to mailable matter of the second class are more specifically:[150]

1. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.
2. It must be issued from a known office of publication.
3. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications: Provided, That publications produced by the stencil, mimeograph, or hectograph process or in imitation of typewriting shall not be regarded as printed within the meaning of this clause.
4. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

A newspaper is defined as a publication regularly issued at stated periods of not longer than one week and having the char-

149 P.L. & R., Sec. 520. 150 Ibid.

acteristic of second-class matter as specified by postal regulations.[151] A periodical is a publication issued regularly at stated intervals less frequently than one week and having the characteristics of second-class matter as defined by the postal laws.[152]

Under these definitions, strictly stated, a weekly magazine might be classed as a newspaper; it is submitted that the definitions are not wholly satisfactory.

On each issue of the newspaper or other periodical entered under mail of the second class there must be carried in a conspicuous place within the first five pages, preferably on the first page, of each copy:[153]

1. Title of the publication, which shall always be shown on the first page.
2. Date of issue.
3. Regular periods of issue; that is to say, frequency.
4. Serial number.
5. Known office of publication.
6. Subscription price.
7. Notice of entry reading as follows:
 Entered as second-class matter ———— at the post office at ———— under the act of ————.

Application for entry of matter as second class may be made through the postmaster of the town or city in which the newspaper or periodical is published.[154] The application must be made on the proper form, accompanied by the proper fee, and two representative copies of the issue desired to be registered as second class; the date of these copies should be nearest to the date of application.[155]

Postmasters are not to accept a strictly new publication for mailing at second-class rates until formally authorized to do so.[156] Admissibility of publications at second-class rates is decided by the Third Postmaster General.[157] Pending acceptance of a publication under second-class rates, the publication may print on copies, "Application for entry as second-class matter is pending."[158] If the application has been made properly, the postmaster may accept conditionally the publication under the second-class classification, provided however that a sufficient deposit be made to cover postage at the regular third-class rate.[159]

[151] P.L. & R., Sec. 543, #11.
[152] P.L. & R., Sec. 543, #12.
[153] P.L. & R., Sec. 530, #2.
[154] P.L. & R., Sec. 528, #2(a).
[155] P.L. & R., Sec. 529, #1 (a).
[156] P.L. & R., Sec. 529, #3.
[157] P.L. & R., Sec. 531.
[158] P.L. & R., Sec. 530, #3.
[159] P.L. & R., Sec. 530, #1.

If there is a change in title, or frequency of issue, if the fee of $10 required for re-entry and two copies of the publication are presented, the postmaster may accept the publication at second-class rates.[160]

The fee which must be paid upon application for second-class mailing privileges is $100; however, if the circulation of the publication making application is not more than 2,000 copies, the fee is $25, and if the circulation is less than 5,000 copies, the fee is $50. A request for re-entry of a publication as second-class mail matter on the ground of a change in title, frequency of issue, office of publication, or for other reason must be accompanied by a fee of $10. An applicant for registry as a news agent must pay a fee of $20.[161]

To maintain second-class status publications must maintain certain stipulated conditions. It is imperative that a publication have a legitimate list of subscribers, which shall consist of: [162]

(a) Such persons as have subscribed for the publication for a definite time, either by themselves or by another on their behalf, and have paid, or promised to pay, for it a substantial sum as compared with the advertised subscription price.

(b) News agents and newsboys purchasing copies for resale.

(c) Purchasers of copies over the publisher's counter.

(d) The receivers of bona fide gift copies, duly accepted, given for their benefit and not to promote the interests of the donor. Persons to whom copies are sent free by the publishers may not be so included.

(e) Other publishers to whom exchanges are mailed, one copy for another.

(f) Advertisers receiving one copy each in proof of the insertion of their advertisements.

To retain good standing with the Post Office Department, a daily newspaper must file with the postal authorities, first, a sworn statement showing the average number of copies of each issue of the publication sold or distributed to subscribers who are not more than twelve months in arrears in payments for their subscriptions, and second, a sworn statement, required also of all newspapers and publications other than religious, fraternal, temperance, scientific, and similar publications, giving the names and post office addresses of the publisher, editor, managing editor,

[160] P.L. & R., Sec. 532, #1.

[161] P.L. & R., Sec. 528, #1.

[162] P.L. & R., Sec. 526, #1.

business managers, owners, stockholders in the newspaper or periodical if published by a corporation, known bondholders, mortgagees, or other security holders. Names of persons owning less than one per centum of the stock, bonds, mortgages, or other securities of such a corporation need not be published, however. A weekly newspaper must now file a circulation statement as well as a statement of ownership. This statement must be filed not later than October 1 of each year and published not later than the second issue of the publication following the filing of such statement. A publication which fails to comply with this requirement ten days after notice by registered letter that such a statement has not been made will be denied the privileges of the mail.[163] Any publication having been admitted to the second-class mail classification may not be suspended or annulled until a hearing has been granted to the interested parties.[164]

Unmailable matter includes stories or pictures that are classed as obscene, libelous, treasonable, and fraudulent; likewise material violating the copyright laws or presenting a lottery are nonmailable.[165]

Postage for all publications of the second class is free in the county of publication, when one copy is addressed to each actual subscriber residing within the county where the paper is published, and printed, in whole or part;[166] however, this free postal regulation applies only to papers delivered to an actual subscriber in the county through general delivery, post office box number, or rural carrier.[167] Individual daily papers and periodicals weighing less than two ounces, delivered in a town or city by letter carrier are subject to a uniform rate of one cent each.[168] Periodicals weighing more than two ounces, when delivered by letter carrier, must carry two cents postage.[169]

The rate for weekly newspapers for local delivery by letter carriers or otherwise is one cent a pound.[170]

Rates for all publications under the second class, except as noted in the two foregoing paragraphs, are as follows:[171]

163 P.L. & R., Sec. 537.

164 P.L. & R., Sec. 536.

165 P.L. & R., Sec. 597; see also the Chapter on Criminal Responsibility herein, and Chapter on Regulation of Advertising.

166 P.L. & R., Sec. 543, #1.

167 P.L. & R., Sec. 543, #4.

168 P.L. & R., Sec. 543, #9.

169 P.L. & R., Sec. 543, #10.

170 P.L. & R., Sec. 543, #8.

171 P.L. & R., Sec. 538, #1, (a) and (b).

(a) On that portion of the publication not devoted to advertisements 1½ cents per pound or fraction thereof.

(b) On that portion of the publication devoted to advertisements according to postal zones, per pound or fraction thereof,
For first and second zones, 1½ cents.
For third zone, 2 cents.
For fourth zone, 3 cents.
For fifth zone, 4 cents.
For sixth zone, 5 cents.
For seventh zone, 6 cents.
For the eighth zone, and between the Philippine Islands and any portion of the United States, including the District of Columbia and the several territories and possessions, 7 cents.

Actual mailing of the publications is subject to the following regulations:

Second-class matter shall be brought for mailing to the post office, or such other place as is designated to receive it, and there weighed in bulk.[172]

It shall be inclosed in United States mail sacks, or other suitable receptacles, and separated to routes, states, and cities, in such manner as may be prescribed by the department.[173] The sacks or bundles shall be marked to show the route, state, or city and state, and also the zone when the copies are required to be separated by zones.

Publishers shall make separate sacks or bundles of sample copies to places within county of publication subject to postage at the rate of 1 cent a pound; sample copies to places outside county of publication; subscribers' copies entitled to free county circulation; subscribers' copies to places within county of publication subject to postage at the rate of 1 cent a pound; subscribers' copies to places outside county of publication.[174] Such mail matter, when so presented, shall be weighed separately.

To maintain independent news and editorial columns and to prevent deception of the public, it is required that the publication of any reading matter for which money or other valuable consideration is promised, paid, or accepted must be clearly marked "advertisement." Violation of this regulation subjects the publisher to a fine of not less than $50 and not more than $500 for each offense.[175]

Publications designed *primarily* for free circulation, for circulation at nominal rates, or for advertising purposes are not en-

[172] P.L. & R., Sec. 541, #9.

[173] P.L. & R., Sec. 541, #10.

[174] P.L. & R., Sec. 541, #11.

[175] P.L. & R., Sec. 537, #2.

titled to second-class pound rates of postage.[176] "Primarily" is intended to mean the chief or principal object of a publication. The determination of the purpose of a publication is in each case a question of fact; however, among the enumerated classes of publications regarded as primarily distributed on a free or nominal basis or for advertising purposes, the Post Office Department specifies the following:[177]

> (a) Those owned and controlled by one or several individuals or business concerns and conducted as an auxiliary to and essentially for the advancement of the main business or calling of those who own or control them;
>
> (b) Those which, having a few or no genuine or paid-up subscriptions, insert advertisements free on the condition that the advertiser will pay for a number of papers which are sent to persons whose names are given to the publisher;
>
> (c) Those which do advertising principally and whose columns are filled with editorial puffs of firms or individuals advertising in the publication, or who buy a certain number of copies for distribution;
>
> (d) Publications devoted largely to advertising and having a nominal list of bona fide subscribers but whose circulation is mainly gratuitous.

It is to be noted that any subscriptions which are sold at a "nominal" rate are not to be considered in the legitimate list of subscribers. Any subscription for which the publisher receives less than 50 per cent of the regularly advertised subscription price in a direct sale or less than 30 per cent of the regularly advertised subscription price, when sold through agents or agencies or in connection with clubbing offers with other publications,[178] may not be counted in the list of legitimate subscribers.

The right of publishers to extend in good faith credit on subscriptions is recognized for a period of one year from the date of expiration. Subscriptions for less than a one year period after the date of expiration may not be counted in the legitimate list of subscribers and hence are not entitled to the second-class privilege.[179]

Publications may send sample copies for the purpose of soliciting subscriptions, advertisements, or news agents.[180] Such sam-

[176] P.L. & R., Sec. 520, Sec. 527.

[177] P.L. & R., Sec. 527, #3.

[178] P.L. & R., Sec. 526, #3, (a) and (b).

[179] P.L. & R., Sec. 526, #4.

[180] P.L. & R., Sec. 547, ##1–7.

ples to be entitled to second-class rates must be complete, unaltered copies of regular editions and be marked as sample copies. They may be addressed on the wrappers to individuals or sent in one wrapper to the postmaster with individual addresses on the respective copies.

Sample copies may be accepted for mailing at second-class poundage rates to the extent of not more than 10 per cent of the total weight of copies mailed to subscribers during the calendar year. For example, if a publisher's poundage during one week amounts to 1,500 pounds, his total allowable for the year would be 78,000 pounds; he could therefore mail sample copies the poundage for which on a yearly basis would be 7,800 pounds. There is, however, the additional requirement that a sample copy shall not be sent through the mail to any one individual more than three times within a calendar year. Any excess poundage in sample copies shall be paid for at the transient second-class rate of 1 cent for each 2 ounces or fraction thereof, except when the postal rates prescribed for the fourth-class matter is lower, in which case the latter rates apply.

Any copies mailed by a publisher as an agent of an advertiser or purchaser are not accepted as sample copies; such copies are subject to the transient second-class rate, as applicable likewise to publications mailed by others than publishers and news agents.

Sample copies are not admitted as free matter within the county of publication.

Publications entitled to second-class mailing privileges may have enfolded within their regular issues such supplements as are germane to the publications which are thus supplemented.[181] Any printed matter entirely distinct and independent of a regular issue of a publication and not germane to the publication is not entitled to acceptance as a supplement. Circulars, handbills, show bills, posters, and other special advertisements are not accepted as supplements.[182] All advertisements must be permanently attached to the publication.[183]

Printed illustrations, including photographs, not in the nature of advertisements, may be pasted to the pages of a publication without violation of the second-class mailing privileges.[184]

[181] P.L. & R., Sec. 548.

[182] P.L. & R., Sec. 550, #2.

[183] P.L. & R., Sec. 551.

[184] P.L. & R., Sec. 552, #5.

Coupons, order forms, and other material intended for detachment may be included in permanently attached advertisements, or elsewhere; these are permissible when such detachable material is incidental, or does not occupy more than one-half of one page.[185]

Partial or incomplete copies of the second class are not regarded as second-class matter but are classed as third or fourth-class mail whichever is applicable; [186] checking copies of advertisements or sheets on which advertisements are printed are an exception to this rule and when mailed by a publisher to an advertiser or his agent may be transmitted at the zone rates of postage applicable to advertising portions of second-class mail.[187]

Back copies of publications entitled to second-class privileges may be mailed at second-class rates.[188] If back copies are bound, they are regarded as books or miscellaneous material according to their physical characteristics.[189]

Bills or receipts for subscriptions may be enclosed also in regular issues of publications. Subscription blanks although printed on cardboard and arranged with receptacle for coin may be included with regular issues of publications. The subscription form may contain an order form for two or more publications providing the newspapers or periodicals are published by the same individual, firm or corporation.[190]

Printing permissible on the wrapper of a publication of the second class is strictly limited. The name and address of the publication may be noted; the name and address of the addressee, index figures of the subscription book, and date when subscription ends may be used on either the wrapper or on the publication itself.[191] A publisher may publish on the wrapper a pledge to pay the postage of undeliverable copies,[192] and may note on either the wrapper or the face of the publication the number of copies enclosed.[193]

The words, "Sample Copy" and "Marked Copy" are allowable, although it is not permissible to use the words, "Please exchange." [194]

185 P.L. & R., Sec. 552, #6.
186 P.L. & R., Sec. 545, #3.
187 P.L. & R., Sec. 539, #1.
188 P.L. & R., Sec. 540, #1.
189 P.L. & R., Sec. 540, #2.
190 P.L. & R., Sec. 553, ##1-5.
191 P.L. & R., Sec. 552, #1.
192 P.L. & R., Sec. 552, #2.
193 P.L. & R., Sec. 552, #4.
194 P.L. & R., Sec. 552, #1, #3.

The Post Office Department may examine all second-class entries to ascertain if the publishers who have been afforded second-class mailing privileges are complying with the law.[195] If other matter is enclosed with second-class matter and if upon examination the postmaster finds that such other matter is not entitled to such privileges, it shall be charged the rate of postage to which such other matter is subject under the regulations.[196] If matter mailed as second class is found not to be entitled to such privilege, the postmaster is instructed to notify the sender and to demand the proper postage to be prepaid and affixed to each separately addressed package.[197]

All entries under the second-class privilege must be securely wrapped and addressed,[198] although it is possible to mail a number of copies to the postmaster at a post office where the wrapping will be broken and the individual copies distributed provided each of the copies is properly addressed to a person living in the district served by the particular post office.[199] Addresses must be written in a legible hand, or printed in plain type not smaller than 10 point.

Entries of publications poorly addressed or not folded and wrapped in accordance with instructions are held back until all other matter is distributed.[200]

A person, a firm, or a corporation may obtain second-class mailing privileges as a news agent of several publications. Anyone who restricts himself to advancing the interests of a single publication or the publications of one publisher is not regarded as a news agent but merely a local agent of the publisher and as such is not entitled to second-class mailing rights.[201]

195 P.L. & R., Sec. 558.

196 P.L. & R., Sec. 557.

197 P.L. & R., Sec. 559.

198 P.L. & R., Sec. 560, #1, #4.

199 P.L. & R., Sec. 560, #3.

200 P.L. & R., Sec. 560, #4.

201 P.L. & R., Sec. 554.

CHAPTER 5

LIBEL

Sec.
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§ 31. THE LIBEL HAZARD

Newspapers are open prey for false libel claims, legal actions for defamation made without intent, and high court costs and damages.

The large circulations of the modern metropolitan newspapers, the development of state, national, and international news coverage through press associations such as the Associated Press, the United Press, and the International News Service, and the furnishing of feature news articles, pictures, and interpretative articles by feature syndicates, have given a new aspect to the protection of reputation. Two additional manifestations of trends in journalism are the tabloid newspapers, which emphasize intimate human interest stories and pictorial presentations of news events, and the liability of chain libel suits based on incorrect or damaging information originating in one source but published in a large number of newspapers. These developments make increasingly difficult the carrying of risks which must be assumed by the press.

Another marked change in the field of libel is defamation by means of radio. Here the problem is one of definition as well as risk necessarily taken by the radio station, which does not have the opportunity to examine all material that is broadcast from its transmitter.

While the newspapers of the late eighteenth and early nineteenth centuries, when the foundations for libel law were being laid in both statute and judicial decision, had comparatively small circulations, many newspapers of today have circulations above

100,000 subscribers. The *New York Daily News* in 1942 had a circulation of 2,013,200 for weekdays and 3,810,226 for Sundays. The circulation of the *New York Times* was daily 440,086 copies, and the *Chicago Daily Tribune* 1,005,992.[1]

The growth of the modern newspaper, with its emphasis on coverage and speed of production, its diversity of editorial source material, and its highly complicated means of preparation of editorial copy, as well as the development of radio, has given emphasis to the need for some revision of libel law, particularly for libel committed without negligence or malice in fact.

The average publisher may not appreciate fully the dangers involved in publishing daily thousands and even hundreds of thousands of words on events of the day. In reporting and commenting upon the news of the world as it occurs, and in buying feature material and cartoons over which he has no or little direct control other than to use or not, depending upon space and policy, the publisher takes chances necessarily.

The publisher places in the hands and minds of his staff a tentative hazard as capable of injuring his business as a dangerous explosive. Obviously, the executive of a newspaper cannot supervise personally every news story, article, picture, cartoon, or comment used in the columns of his publication, and even if he could do so, it would hardly be possible for him to know, under all circumstances, whether libel is involved.

Newspapers are open prey for the libel racketeer. They have been, and still are, in numerous jurisdictions, subject to libel claims for locally written stories which they print without malice and even for stories and articles which come to editors' desks through feature syndicates and press associations. Defamation as a legal wrong is a law unto itself, complicated and filled with irregularities. This law of libel depends upon both judicial precedent and legislation.

The law of libel is both ancient and anomalous; in several aspects libel law is ill-defined and unsatisfactory. In neither its substantive phase nor its enforcement of substantive rights through adjective law is this branch of tort jurisprudence perfect. The development of libel law is an outgrowth of the law of slander. It is founded upon the protection of reputation. While it has been said that the law of defamation may be jus-

[1] Circulation figures for 1942, as given in the Editor & Publisher Yearbook, Jan. 30, 1943.

tified, it can be accounted for, however, only in the same manner that one would account "for the distorted shape of an ugly tree." [2]

It is not the purpose here to trace this development, rather merely to look at the libel hazard as it exists today, and to see how liability for this type of defamation can be reduced. It must be realized, in the first instance, that in this country there are 48 different state jurisdictions, in addition to Federal jurisdiction, with all their individual and often contradictory laws, rules, and interpretations.

Libel is a contingent liability.[3] To face a libel suit entails certain grave dangers, which the publisher may well respect. To print a defamatory story means worry and administrative time in handling a libel claim, and in effecting a settlement, if possible; further, it means that if the libel claim cannot be settled there will be the expense of defending the suit. Irrespective of the success of defending the suit, there is the cost of preparation of the defense including attorneys' fees. If the suit is lost, there is the additional expense of a judgment against the paper. If an appeal is taken, there is further preparation and legal expense, and still the possibility of losing the appeal.

The judgment in a suit for libel may be from one cent up, but the legal expense, even on a suit which is won by the publication, may easily run into thousands of dollars.

In one libel suit against a metropolitan paper, the actual trial of the suit extended over a period of more than three months; prior preparation in securing evidence necessary to maintain a defense of justification or truth consumed the energies of one experienced attorney for more than three years, in addition to the work of several other attorneys, investigators, and clerks for lesser periods. It is estimated that the expense preparatory to the trial and the expense of the trial itself exceeded $200,000.

Some years ago the *Chicago Tribune* called Henry Ford an anarchist.[4] Mr. Ford sued the *Tribune* for libel and received a verdict of six cents. The *Tribune* never paid that six cents because it claimed the judgment was not suable in Michigan where

[2] 1 Street, The Foundations of Legal Liability (1st Ed. 1906) 273.

[3] Thayer, *The Libel Hazard;* Bulletin of the Inland Daily Press Association, June 10, 1939, p. 284.

[4] Ford v. Chicago Tribune, Circuit Court, Wayne County, Mich., No. 67, 999. Declaration filed Sept. 24, 1917. Held for plaintiff with verdict for 6 cents. No appeal taken.

the trial took place. Reported at more than $500,000, the Tribune's defense cost $303,968.72, according to its counsel.

In the twenty year period from 1910 to 1930 the *New York World,* publishing morning, evening and Sunday editions, was faced with 220 libel claims, totaling $17,600,168, according to A. S. Van Benthuysen, former treasurer of that paper.[5] However, the aggregate cost of settlements and verdicts amounted to *but $115,420.36, or an average of $5,496.21 a year.* The verdicts accounted for $45,000 and the settlements and other claims $70,420.36. The cost to the *New York World* in verdicts and claims was only 0.65 per cent of the total amount of claims. The low figure is accounted for, in part, by the carefulness of the *World* staff in stopping defamatory copy from getting into print, and in the excellence of its legal counsel.

Libel dangers lurk in ordinary, inaccurate reporting and careless commentary. Experience shows that unusual danger arises in covering local police arrests, police investigations, and court news. Stories received from wire and syndicate services are sometimes sources of difficulty although in consideration of the huge volume of words received daily by the newspapers from press associations the number of inaccuracies would seem surprisingly small.

Investigations by police officers, officials in the district attorney's office or the coroner's office, are not privileged communications, and so newspaper stories based on such reports or investigations are not accorded qualified privilege, according to the weight of authority. Information given newspapers by tipsters or stool pigeons is even more untrustworthy so far as legal protection is concerned; if the newspaper commits error and publishes a defamatory story on the basis of such information it would not have the protection of qualified privilege.

A newspaper has a right to publish the information that a person has been arrested, but this right does not permit any assertion of guilt to the party thus taken into custody.[6] For a fair and accurate report of an arrest, the newspaper is protected by truth, particularly when published with good motives for justifiable ends; for a report of court proceedings connected or growing out of the arrest, the newspaper is protected by quali-

[5] Van Benthuysen, A. S., Newspaper Organization and Accounting, pp. 20, 21.

[6] Usher v. Severance, 20 Me. 9, 37 Am.Dec. 33 (1841); Republican Pub. Co. v. Conroy, 5 Colo.App. 262, 38 P. 423 (1894), rehearing denied (1894); Morasca v. Item Co., 126 La. 426, 52 So. 565, 30 L.R.A.,N.S., 315 (1910).

fied privilege, despite the fact that the story may reflect upon the persons involved and tend to bring them into public disrepute.[7]

Some years ago the reporter for a morning paper stepped into the office for an interview with the man who had successfully prosecuted for embezzlement a heretofore reputed financial genius. The following morning the reporter's paper carried the story of the conviction, as well as the interview with the district attorney. This interview was as follows:

> "Brown has been a financial racketeer since 1918," District Attorney Perkins said after the verdict. "This is the first time the law has caught up with him, although he has been accused of confidence game, swindling and other crimes. * * *
>
> "There are thousands of Brown's victims in this county alone.
>
> The public has lost more than $20,000,000 in his various schemes. His swindles have been enormous."

Brown sued the newspaper and the district attorney jointly for $1,500,000. The defense was truth or justification. After a long and expensive trial the plaintiff lost his case. No appeal was taken.

This account is founded upon an actual case although the names used are not the real parties who participated in the trial. However, this illustration serves to show how a newspaper may easily find itself involved in the throes of an expensive libel suit. There are those ready to open the newspaper's strong box with the key of a libel claim.

Potential liability in handling wire stories may be seen in the suit filed in New York Feb. 17, 1943 by the National Maritime Union (C.I.O.) against the Associated Press and the Hearst Consolidated Publications, Inc. as publishers of the *New York Journal-American* for the dissemination of the story that merchant seamen refused to unload ships at Guadalcanal on Sunday. In a single complaint the union sought $1,000,000 damages each from the Associated Press and the Hearst Publications. The complaint charged that the story tended "to impugn the union and its members for acts and conspiracies of subversion, sabotage and mutiny and designed to expose them to ridicule." The story originated in the office of the *Akron Beacon-Journal* and was distributed by the press association. It was further charged that the A. P. failed to make an independent investiga-

[7] Sherwood v. Evening News Ass'n, 256 Mich. 318, 239 N.W. 305 (1931).

tion to verify the story. The truth of the story was denied by Secretary of Navy Frank Knox, Adm. William F. Halsey, commander in the South Pacific, and Maj. Gen. Alexander A. Vandegrift, Marine commander at Guadalcanal.[8]

The union could sue any one of the more than 1400 A. P. member newspapers[9] that used the story. How could the telegraph editor of the *Cedar Rapids Gazette* or the *Madison Capital Times* have known that the story might have been untrue? He would have little chance to investigate for himself as would the city editor on a local police run story. This example serves to illustrate the libel hazard in publishing telegraph news, the authenticity of which depends upon the training, accuracy, and reliability of a reporter many thousands of miles away.

The possibility of chain libel suits opens up new liabilities for publishers. This hazard is exemplified in Representative Martin L. Sweeney's suits against some 68 newspapers for approximately $7,500,000 on the ground of an article appearing in the Washington Merry-Go-Round, then edited by Drew Pearson and Robert S. Allen and syndicated throughout the country by the United Feature Syndicate.[10] In this article the writers reported that Representative Sweeney of Ohio was a spokesman for Father Coughlin and that in 1938 he opposed the appointment of a foreign-born Jew to the Federal bench in Cleveland.[11]

The danger of comment upon political candidates and public officials is well illustrated in Hoan v. Journal Co.,[12] in which Mayor Hoan of Milwaukee lost his case against the *Journal* which had quoted the mayor of Sheboygan Falls charging Hoan as being responsible for bombings in Milwaukee. Despite the fact that the Wisconsin Supreme Court affirmed the dismissal of the complaint, this case illustrates the risk that must be undertaken by the press, particularly in defending itself for publication of comments upon public characters.[13]

The best protection is twofold, first, to have an editorial staff so well informed and trained that defamatory stories or arti-

[8] Chicago Sun, Feb. 18, 1943, p. 1.

[9] The Associated Press Directory, January 1940.

[10] Editor & Publisher, Jan. 18, 1941, p. 30.

[11] For facts on this case, *see* Sweeney v. Schenectady Union Pub. Co., 122 F.2d 288 (C.C.A.N.Y.1941).

[12] 238 Wis. 311, 298 N.W. 228 (1941); *see also* Hoan v. Journal Co., 241 Wis. 483, 6 N.W.2d 185 (1942).

[13] For a discussion of this case and the problems of defense *see* Comment (1942) Wis.Law Rev. 412–422.

cles will not get by the copy desk, and second, to have competent counsel.

It is also possible to carry libel insurance. One insurance organization [14] began writing libel and slander insurance for newspapers and radio stations in 1930–31. The insurance is written on an excess basis, the assured carrying $2,500 to $5,000 of the risk and the insurer the excess up to $100,000. Its purpose is not to protect the newspaper against a small claim but rather to indemnify the publication in case of a catastrophe, should an unusually large judgment be given against the newspaper.

On the assumption that most libel claims are small, some publishers think that libel insurance is not absolutely necessary; small risks are carried by the publisher even in case libel insurance is taken. On the contrary, a very large claim against a publisher might easily jeopardize the financial stability of a moderately sized daily newspaper.

Publishers in making contracts for news and feature services may include clauses making the feature syndicate responsible to save "the newspaper harmless" if and when a defamatory article is furnished by such syndicate and published by such newspaper.

There is another protection favored by many attorneys. This is the reluctance of many members of the Bar, in the first instance, to take libel suits. William Scott Stewart, a leading trial lawyer of the Chicago Bar, even points out that there is a conspiracy on the part of the press against any libel plaintiff. Says Mr. Stewart in offering advice to young attorneys:

> Don't take libel cases against newspapers. You will find that they are in conspiracy against any plaintiff. No matter how much the newspapers fight against each other, they print no news about libel cases. This is, no doubt, self-preservation. You will find more technical rules of pleading than you thought could exist. The judge does not wish to have any trouble with the paper and he will follow the law strictly. In a large city it takes months and sometimes years before a libel case can be brought to trial. Meanwhile, the powerful newspaper will be working on the case. If you or your client are vulnerable, they will find it out. I have never sued a newspaper and have advised against it in a number of cases. One such case comes to mind. The newspapers were conducting a campaign against gangsters during prohibition. There was a shooting. The coroner's jury exonerated the suspected gangster so the news-

[14] Employers Reinsurance Corporation, Kansas City, Mo.

> papers created a scandal. One paper printed a big headline and the picture of one of the jurors stating that he was an ex-convict. The truth of the matter was that he was a respectable business man and had become sponsor for a convict on parole. He came to me with what appeared to be a perfect libel suit. I advised him not to sue but to demand that the paper retract. I made arrangements for the paper to do so. The paper retracted with a picture in a manner as prominent as the original story, according to our agreement. I shall never forget a remark made by the agent for the paper. I said that I had advised my client that it was not good policy to sue a newspaper. He said, "You are right. We would get something on him, even if we had to plant some stolen furs in his place." The agent may have been, and most likely was, speaking without authority, but his remark represents the attitude of certain groups connected with newspapers. It is a rare citizen who can stand the limelight on all of his private affairs. Be independent and fearless but do not try the impossible. Newspapers are powerful. You do not need to cater to them, but be careful about fighting them. [15]

The facts however remain sufficiently strong and varied to indicate that reluctance of the Bar to prosecute libel suits has not deterred most troublesome and costly suits against newspapers and periodicals, as it has been indicated, for example, by the experiences of such papers as the *Chicago Tribune* and the *New York World.*

Should the publisher and his counsel feel that, without doubt, a libel has been committed, it might be well to settle with the injured party out of court.

If the publisher actually commits what he believes to be a libel, he may endeavor to make amends by publishing an apology, or a retraction. It would be well for him to consult a lawyer, however, as an apology may be made grudgingly or may serve only to emphasize the libel further.

If such a retraction is made in good faith, and is used promptly, damages may be mitigated, although the publisher will not necessarily be wholly exonerated from his original carelessness, or recklessness, in publishing the libel.

The effect of a prompt and gracious apology including a correction, may be used as evidence to show that the publisher had no malice in fact or bitterness or hatred in his heart against the plaintiff when the libel was published.

[15] Stewart, William Scott, Trial Strategy, pp. 22, 23.

While it is well established that a retraction of a libelous statement in a closely succeeding issue, with equal prominence given to the retraction as was given to the libelous statement, may be shown in mitigation of damages to rebut any presumption of malice, some states do not recognize the doctrine that a retraction will prevent general damages.

Further protection may be obtained by more favorable libel legislation especially regarding the effect of retraction as a bar to punitive damages and contribution of tort-feasors in libel cases.

Attempts to unscramble the law of libel through legislative action, however, have not always met with success. Courts have frequently frowned upon legislative attempts to modify the common law principles of libel law. Other courts have seen the necessity for some reasonable change. Clearly, modernization of the libel law is in order, but suggestions for change are not always sound and so have not been acceptable by students of jurisprudence.

Some modification has come through intelligent departures from the common law, in such cases for example, as John H. Layne v. The Tribune Co.[16]

In this case, the facts as stated show that the *Tampa Morning Tribune* published two dispatches under a Washington dateline, one under authority of the Associated Press, and the other under authority of the Universal (Hearst) News Service. The first news story stated in substance that Representative Dennison of Illinois, known as a "dry", together with his former secretary, John Layne, had been indicted by the Federal government on the charge of illegal possession of liquor; the second dispatch stated that Dennison had been in possession of liquor and further recounted the incident of a leaky suit case consigned to Dennison's office. In the second dispatch, it was stated that Layne had been indicted also. Layne began an action against the Tribune. The trial court gave judgment for the defendant newspaper, and the higher court affirmed that decision.

This decision goes far afield from the common law conception of repetitious libel. At common law the repetition of a libel in itself constitutes a libel, but under the doctrine laid down in John H. Layne v. The Tribune Co., a Florida newspaper is freed from liability for repetition of a libel when the information on

[16] 108 Fla. 177, 146 So. 234, 86 A. L.R. 466 (1933).

which the story was based comes from such a reliable news source as an established press association, if there is no negligence or malice in fact proved by the plaintiff.

Whether this doctrine will be widely accepted by the courts of the several states remains a question.

In 1939 Georgia approved a special libel statute which was hailed by the press as a model law; some efforts were made to have a similar law passed elsewhere. This statute provided for retraction and limitation of damages.[17]

Several noteworthy attempts to revise the common law principles applicable to retraction of an alleged libelous statement and the limitation of damages have been made. It is well established that an apology and retraction by a publisher, if made promptly and wholeheartedly, will mitigate damages, or tend to neutralize the legal injury of the first article.[18] Authoritative cases over a long period of years do not clearly indicate however that an injury to reputation will be repaired by a retraction for the reason that many who might read the original

[17] Georgia Laws 1939, Part 1, Title VI, No. 225, p. 343 (approved March 20, 1939), § 1. Before any civil action shall be brought because of any publication of a libel in any newspaper, magazine or periodical, the plaintiff shall, within the period of the statute of limitations for such actions and at least five days before instituting such action, give notice in writing to the defendant specifying the article and the statement therein which he claims to be false and defamatory and further stating in said notice what the complaining party claims to be the true state of facts.

§ 2. If it appears upon the trial of any case in which such notice has been given that the article published was true or that the same was privileged, the same shall be governed by all the laws of Georgia now in force in reference to such actions, and the truth shall be complete defense and the privileged communication, if there be no malice, as is now provided, shall be a complete defense, but in all other cases if it appears upon the trial that said article was published in good faith, that its publication was due to an honest mistake of the facts; that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction or retraction was published in the same editions or corresponding issues of the newspaper, magazine or periodical in which said article appeared and in as conspicuous a place and type as was said original article, then the plaintiff in such case shall recover only such special or actual damages as the plaintiff shows he has sustained.

§ 3. This Act shall not apply to any action for libel now presiding in any of the courts of this State.

§ 4. All laws and parts of laws in conflict with this act or any part thereof are hereby repealed.

[18] James v. Powell, 154 Va. 96, 152 S.E. 539 (1930).

story may not see the retraction.[19] The jury is entitled to give consideration to both the original and the subsequent article in their determination of the net damage the plaintiff has suffered.[20]

What might be a precedent-making decision in radio defamation is Summit Hotel Co. v. National Broadcasting Co.,[21] which recognized that radio presents a problem different from that which obtains with the newspaper and which held for the defendant corporation, which had appealed the trial court's judgment. The newspaper is generally absolutely liable for published defamatory statements unless it succeeds in a defense or justification, qualified privilege, or fair comment; however, the radio station does not have the opportunity to inspect all material before such material is broadcast; this is particularly true with interjected "ad lib" statements in regular broadcasts or in programs such as unrehearsed interviews on the street, at public occasions, and in the studio.

The Judicial Council of Massachusetts, established by legislation in 1924 and 1927, for the purpose of continuous study of the organization, rules and methods of procedure and practice of the judicial system in that commonwealth, the work accomplished, and the results of the judicial system, made a special study of suggested changes in the libel law in that jurisdiction. The council made its report[22] in December 1942, recommending that there be no codification of the libel law for the reason that such an attempt would merely duplicate the work on Defamation contained in the American Law Institute's The Restatement of the Law of Torts.[23]

In this report the council recommended that a proposed statute which makes untruth published with malicious intent the only standard for liability in libel ought not to pass. The council further disapproved of a change that if passed by the legislature would not permit actual malice in a defamation case to enhance the damages, and likewise disapproved the proposal that the plaintiff could recover only for special damage sustained.

[19] Perret v. New Orleans Times Newspaper, 25 La.Ann. 170 (1873).

[20] Webb v. Call Pub. Co., 173 Wis. 45, 180 N.W. 263, 13 A.L.R. 790 (1920).

[21] 336 Pa. 182, 8 A.2d 302, 124 A. L.R. 968 (1939).

[22] (1943) 28 Massachusetts Law Quarterly 39–57.

[23] 3 Restatement, Torts, div. 5, §§ 24–27.

The council recommended that there be a special law for defamation over the radio, that in chain libel suits the plaintiff must show that he has brought other actions for the defamation in other jurisdictions, and that when the defendant gives written notice to the plaintiff, at any time after publication, either before or after such action is brought, to the effect that it is his intention to publish a retraction and the retraction is published, the defendant may prove such publication of retraction, or if the offer to publish such retraction is refused, the defendant may so prove in mitigation of damages.

The council favored also a statutory amendment providing that the publication of defamatory matter in civil pleadings shall not be privileged until after the opening of the public trial of a case on its merits. The council expressed favor for the judicial holding in Bodwell v. Swan [24] that statements of the defendant other than the one which is the basis of the current action should not be admitted in evidence unless they are substantially similar in import and so indicative of a scheme or campaign of vilification.

Newspapers should accept full responsibility when in the course of their operation they actually injure the reputation of another. The newspaper is no more especially privileged than any individual citizen, but to submit to the liability of general damages, when no fault has been committed, is too great a hazard to the newspaper business, and illogical with the general theory of liability for civil injuries in other fields of law.

Some changes are in order, but the fundamental principles should be cautiously preserved. The fine balance between the protection of reputation on the one hand and the risk for nonnegligent and nonmalicious violation of that right must be maintained.

It would seem that the defense of truth when published with good motives for justifiable ends is the better jurisprudence, following out Lord Campbell's Act [25] (1843) for criminal libel; that press reports of pleadings should not be accorded qualified privilege; that liability be scaled down when a newspaper accepts news dispatches from such reliable sources as the three established press associations; that the rules of evidence be such that in any one suit for libel the fact be shown that other suits

[24] 3 Pick. 376 (1825).

[25] 83 Stat. at Large (1943) 6 & 7 Vict. c. 96.

have been begun or that damages have been received for violations by means of the same released story in other jurisdictions; and that a new form of defamation to cover radio liability should be established.

§ 32. LIBEL DEFINED

Printed defamation is a civil injury subjecting the publisher to damages; it may be criminal when and if it tends to cause a breach of the peace.

Defamation has been defined as the taking from another's reputation.[26] Etymologically the word defamation comes from the Latin, *diffamare,* or "to spread a bad report." [27] Slander, as one type of defamation means scandal, of which the oldest French form was *escandle.* Libel, or written accusation, is a word derived from the Latin, *libellum.*[28]

One English authority, Fraser, in his work on Libel and Slander, defines a defamatory statement as "a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned, or avoided, or which has a tendency to injure him in his office, profession, or trade. Such a statement, if in writing, printing, or other permanent form is a libel; if in spoken words or significant gestures, a slander." [29]

Button, another English authority on this subject, gives the broad definition of defamation, as follows: "Defamation may be broadly defined as a false and damaging statement. If it is published it becomes actionable." [30]

Defamation as a civil injury is a tort. Salmond in his Jurisprudence defines this type of injury as follows: "A tort may be defined as a civil wrong, for which the remedy is an action for damages, and which is not solely a breach of contract or the breach of a trust or other equitable obligation." [31]

[26] Hollenbeck v. Hall, 103 Iowa 214, 72 N.W. 518, 39 L.R.A. 734, 64 Am. St.Rep. 175 (1897); *see* Webster's Dictionary.

[27] The Middle English word for defamation is *defamen* or *diffamen;* the Old French form is *diffamer,* "to take away a man's character" Skeat, W. W., Concise Etymological Dictionary of the English Language.

[28] Ibid.

[29] Fraser, H., Libel and Slander (7th Ed.) p. 3.

[30] Button, W. A., Libel and Slander, p. 1.

[31] Salmond, Sir John, Jurisprudence (7th Ed.) p. 486.

Willis, in his Introduction to Anglo-American Law, defines a tort as a violation of a private antecedent duty in rem.[32] To one not learned in jurisprudence, such a definition is not clear. Upon the tenets of the duty-right theory of jurisprudence, one may see that a duty is imposed upon everyone to respect the rights of others; this duty is *in rem,* or under Anglo-American jurisdictions lies in favor of one person as against the world. As applied to the tort of defamation, it may be said that the duty to respect the right of others' reputations lies upon each person; the duty is existent at all times; a violation of that duty by defaming another is a violation of this duty of a private individual as against all other persons; such would be a tort of defamation.

To understand why certain distinctions are made, one must realize that a branch of the law ordinarily does not become formulated as a code at one time by a set of commissioners who set for themselves the task of finding definite solutions for all legal problems in that field; rather a branch of the law, as defamation, has been evolved over a long period of time in answer to certain human needs. The customs of a people and their procedures in settling their legal rights become an inheritance; so it has been with the law of defamation.

For the purpose of this study, the primary interest in defamation lies in libel rather than in slander. As written words came after spoken words, so libel came after slander.

There are some peculiar rulings in the law of defamation; to understand them, it is necessary to consult legal history. Within the scope of this study of legal controls, of which the law of libel is one, it is not possible to trace the entire history of defamation; however, some historical background is imperative.

The court, in Williams v. Hicks Printing Co.,[33] emphasized the value of character or reputation, as follows:

> Character is a man's choicest treasure. The wrongdoer who robs one of land or money or anything material, essential to his pursuit of happiness, is reprehensible and unworthy of a place in the social state, but one who intentionally robs another of his good character is a wrongdoer in a higher degree, from a moral standpoint whether so recognized in the law or not. Life itself without worthwhile character is of little or no value to its possessor or any one else.

[32] Willis, H. E., Introduction to Anglo-American Law, p. 25.

[33] 159 Wis. 90, 100, 150 N.W. 183 (1914).

Shakespeare said:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.[34]

If one does not have good character, it is not libelous so to state provided the publisher can support substantially his published statement. No court will give civil redress for a harmful statement about another if the statement is true, especially if published with good motives and for justifiable ends. The law does not allow legal remedy when it is not deserved.

Though both slander and libel are defamation, there are certain marked distinctions, largely because of the inherent difference between the two divisions of defamation and because of the historical development of these branches of the law.

If X said falsely of Y that Y had committed adultery with his sister-in-law, the wrong done would clearly be libel if the statement were printed. It was held not to be slander.[35] The reason for the fact that such a statement was not slander is that adultery was not an indictable offense at early common law. In the popular sense, of course, such a statement would be *in fact* slanderous; if the statement were in a newspaper, the publisher could be sued for civil libel, and if such a statement might induce a breach of the peace, such a statement could be the basis of a prosecution for criminal libel.

In Pollard v. Lyon,[36] the court stated:

> Unless the words alleged impute the offence of adultery, it can hardly be contended that they impute any criminal offence for which the party may be indicted and punished in this district.

Strange indeed to the newspaper man is such a decision, but such is the law, unless modified by statute. And if special damages had been proved, as for example, to show that the plaintiff had lost her prospective marriage to another, or had suffered pecuniary damage as well as the loss of the hospitality of her friends, she could likely have recovered.[37]

[34] Othello, Act 3, Sc. 3.

[35] Dukes v. Clark, 2 Blackf. 20 (Ind.1826).

[36] 91 U.S. 225, 227, 23 L.Ed. 308 (1875).

[37] Moore v. Meagher (1807), 1

England, by its passage of the Slander of Women Act (1891),[38] recognized the legal necessity of protecting the good name of women. Section 1 of this act stated:

> Words spoken and published after the passing of this Act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable.

This act provided that a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for maintaining the action.

To understand fully the historical distinction between libel and slander, the authoritative case of Thorley v. Lord Kerry[39] should be cited. The case concerned an action on a libel published in a letter charging Lord Kerry with being a hypocrite and using religion for unworthy purposes. It was argued by the defendant that there was no solid ground, either in authority or principle, for the distinction supposed to have prevailed in some cases, that certain words are actionable when written which are not actionable when spoken. The opinion of Lord Mansfield admitted the logic of the defendant's argument that no distinction should lie between actionable words, written or spoken; however, his decision was against the defendant; the court stated:

> An action for a libel may be brought on words written, when the words, if spoken, would not sustain it. * * * If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.[40]

Research into the early history of slander indicates that this form of civil wrong was within the jurisdiction of feudal courts which had likely absorbed the authority of the leet court of the Hundred.[41] When the feudal courts became obsolete, jurisdiction in slander cases seems to have been taken over by the ecclesiastical courts, for the offense seemed to the early judges to be spiritual. Slander was considered a sin and was punished by inflicting penance. In the time of Elizabeth, the common law courts took some recognition of this offense. Gradually the com-

Taunt. 39, Williams v. Hill, 19 Wend. 306 (N.Y.1838); Craver v. Norton, 114 Iowa 46, 86 N.W. 54, 89 Am.St. Rep. 346 (1901).

[38] 54 & 55 Vict. c. 51.

[39] (1812) 4 Taunt. 355.

[40] Ibid., 364, 365.

[41] Jenks, Edward, Short History of English Law, pp. 145–149.

mon law courts allowed actions for such offenses as charging a public officer with corruption, defamation in respect to one's business, the imputing of crime, lack of virtue of either a man or woman, words that would tend to disinherit, and the false allegation that one had a loathsome venereal disease, the plague, or leprosy.[42]

The history of libel is quite different. Prior to the invention of the printing press, there were not many opportunities for the commission of such an offense; according to Jenks, the ecclesiastical courts entertained suits for libel or slander in writing. When the printing press appeared, the opportunities for libelous statements increased and the Court of the Star Chamber took recognition of libel.

In earlier times some writers mentioned slander as oral or written, but in modern concept slander is taken as communication of thought by means of sound concerning the reputation of another. Slander may be by song or by inarticulate sounds as booing or hissing. Slander concerns the reception of the defamatory thought through the ear primarily; however, the language of deaf-mutes is considered slander even though it appeals to the eye. Libel on the contrary concerns primarily the reception of defamatory thought through the eye. This distinction may be taken as the best working distinction between the two classes of defamation. The important element in defamation is the communication of thought concerning a third person from one mind to another. The instrumentalities are not necessarily so important. In slander as conceived under the standards of the common law, the communication is transitory; in libel the communication is in more permanent form. It is likely that defamatory words written in sand, or defamatory pictures drawn in the sand would be libel rather than slander, even though the temporary words or pictures were in existence for only moments of time. Skywriting which has been used frequently for advertising purposes is temporary, but nevertheless the writing in a gaseous material in space would be writing which might be effectively read by thousands of persons, especially in populous areas; the record, although transitory, exists for a sufficient time to be highly effective, addressing its message to the minds of the populace through the medium of the eye.

[42] Street, T. A., Foundations of Legal Liability, pp. 282, 283; 4 Coke 12b–20 on Actions for Slander.

It is submitted that a record made on a phonograph, if defamatory, would be libel; as also would a motion picture film, for although the picture is seen momentarily, there is a permanent record subject to exhibition in many places at different times.

Slanderous words which would be actionable in themselves, rather than actionable upon proof of special damage, include:

1. Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge be true, may be indicted and punished.

2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge be true, it would exclude the party from society.

3. Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment.

4. Defamatory words falsely spoken of a party which prejudice others against such party in his or her profession or trade.[43]

5. False words that would tend to disinherit a person, as, for example, a representation that the person is illegitimate.[44]

6. Words that impute unchastity or immorality to a woman or girl.[45]

It is submitted that the first five classifications are well founded in the common law. The sixth classification is a modification of the common law, except in cases where special damage is shown.

Words not actionable in themselves may become actionable of course if special damage is shown.

The publication of slander and civil libel must be to a third person or third persons; in the case of criminal libel however, the publication may be only to the person libeled provided the libel might induce a breach of the peace.

Early law writers were surprisingly indefinite in defining the term, libel. According to Samuel Merrill, in his study of Newspaper Libel, published in 1888, Jeremy Bentham was authority for this definition of libel: "A libel is anything published up-

[43] Pollard v. Lyon, 91 U.S. 225, 23 L.Ed. 308 (1875).

[44] Street, T. A., Foundations of Legal Liability, p. 278.

[45] Button, W. A., Libel and Slander, p. 19.

on any matter of anybody which any one was pleased to dislike." Lord Kenyon stated, according to Merrill, "A man may publish whatever a jury of his countrymen think is not blamable." [46]

Written or printed defamation may be divided into three general classifications:

Civil libel
Trade libel or disparagement of property
Criminal libel

Libel is defamation; it is the violation of the right of reputation. Any written or printed infringement of the right of reputation of another is subject to legal redress, civilly or criminally, or both. Libel is primarily written or printed defamation, as distinguished from slander or oral defamation.

Written or printed defamation is a civil injury to the reputation of a private party; redress is through suit by the offended party.

Libel, it is clear, may be implied in signs, cartoons, pictures, symbols, statues, or other forms of representation capable of only temporary record.

Libel was defined in the celebrated case of People v. Croswell [47] as "a censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals." In Taylor v. Hearst, the court defined libel as "a false and unprivileged publication, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business." [48]

No definition is entirely satisfactory, but sufficient citations of cases and authorities make clear the approximation; the exact limitations are exceedingly difficult to be set; sufficient information has been given to show when a publication is on dangerous ground.

Many other definitions have been attempted; *Omnis definitio in lege periculosa est* or "every definition in law is dangerous" applies. It is not easy to state what might be defamatory; defamation varies according to localities and circumstances. What a jury might hold defamatory on one set of facts might

[46] Merrill, Samuel, Newspaper Libel, p. 39.

[47] 3 Johns.Cases 337, 354, appendix, 3 Wheeler Cr.Cas. 330 (1804); Steele v. Southwick, 9 Johns.Rep. 214 (1812).

[48] 107 Cal. 262, 269, 40 P. 392 (1895).

be held *contra* in a similar set of circumstances in another state, and in fact even in the same state; what might be defamatory at one time might be clearly regarded as harmless at another time.

A modern definition of libel, as based on a searching investigation of cases and authorities, may be stated as follows: Civil libel is a publication, expressed either in printing or writing, or by signs, diagrams, cartoons, or pictures, tending to blacken the reputation of a living person so as to expose him to public hatred, contempt, or ridicule.

Trade libel may be defined as a disparagement of property, real or personal, to the pecuniary damage to the owner thereof. Trade libel is sometimes known as slander of goods in reference to personal property; another form is slander of title. All these forms are in their nature closely related; they are discussed in the Chapter on Libel to Property.

Conduct has been held to be libel if such conduct is defamatory; based on such precedent it would seem therefore that there is every reason to hold logically that a defamatory broadcast would constitute libelous conduct.

Numerous cases might be cited to show libelous conduct, especially Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co.,[49] in which it was held that notorious shadowing by detectives constituted conduct which would bring the person shadowed into public contempt and disrepute. In this case the court stated:

> It must be conceded that to publicly proclaim one suspect, to publicly charge that he deserves watching, does subject him to public disrepute, ridicule, and contempt. If so, the acts here complained of are the analogue of libel except the writing, printing, and passing around. But these elements are supplied by the public, notorious, and continued character of the surveillance. We must hold that rough or open shadowing as here described and defined is an unlawful act resulting in legal injury to the reputation of the person who is the object of such attentions. Actual pursuit and public surveillance of person and home are suggestive of criminality fatal to public esteem and productive of public contempt or ridicule. * * * A conspiracy to libel the plaintiff or to commit any other wrong to his person, reputation, or property may, when damage follows, be the subject of a civil action.[50]

[49] 151 Wis. 537, 139 N.W. 386, 43 L.R.A.,N.S., 520 (1913).

[50] 151 Wis. 537, 545, 139 N.W. 386, 43 L.R.A.,N.S., 520 (1913).

To hold conduct a libel, it would seem that the conduct would have to be continuous for a sufficient time to make more than passing temporary impression upon the public mind; such an impression would be created of course in a continuous act of open shadowing, in a charivari, or in efforts to seize goods in payment for an unfounded debt.

It is submitted further that conduct upon the part of a newspaper in ridiculing a private person, conduct amounting to a conspiracy, might be libelous conduct even though any one story in itself might not be libelous without proof of special damage.

An early case held that the placing of a lighted lamp before a dwelling of another constituted libelous conduct, as the burning of a lamp before a house in that day indicated according to the *mores* of the times a bawdy house or a house of ill fame.[51]

Criminal libel embraces several divisions. In a narrow sense a criminal libel under the common law is one which tends to induce a breach of the peace; in a broader sense under the principles of the common law, criminal libel is written or printed defamation which tends to cause a breach of the peace, to overthrow the established government, to offend public morals, or to revile the Deity; as such libel is a crime, prosecution for the offense is by the government.

Various states of the United States have given statutory definition to criminal libel; these definitions in general make a crime of any civil libel issued maliciously, any libel which tends to cause a breach of the peace, and any vilification of the memory of the dead. Iowa, for example, defines criminal libel as follows:

> A libel is a malicious defamation of a person, made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends.[52]

Criminal libel is discussed in the Chapter on Criminal Responsibility.

[51] Jefferies v. Duncombe, (1809), 11 East 226.

[52] Code of Iowa 1939, § 13256.

§ 33. LIBELOUS WORDS CLASSIFIED

Words actionable in themselves are libelous *per se;* words not actionable in themselves are libelous *per quod* when special damages are proved; an intermediate class of words is libelous when special circumstances are shown.

The difficulty of saying in advance what is libelous may be appreciated in opposing decisions on the libelous nature of practically the same word or expression. In those states in which the court determines whether as a matter of law a word or expression is libelous *per se,* or in case of doubt refers the defamatory character of the expression to the jury, and in those states in which the entire question, both law and fact, is for the jury, the decisions naturally vary because of several factors, the attitude and character of the court and members of the jury, the circumstances of the particular case in question, and the technical functioning of the adjective law through the skill of the attorneys for both plaintiff and defendant.

The difficulty may be illustrated by two cases in both of which the plaintiff was likened to hog or swine. In the earlier case, Solverson v. Peterson,[53] the plaintiff was mentioned as:

> king of the Norwegians,—a character so mystical and eccentric that everyone would be interested to hear from him. * * * He takes us back to the time when the star of human progress was just rising above the dark horizon of human ignorance; when the king of Babylon was changed into an ox and lived on grass. * * * But let us doubt such things no longer, when I tell you that at the present time this great king, in whose veins courses the blood of the ancient viking, has turned into an enormous swine, which lives on lame horses. * * * Doctors say there is no hope for his recovery, and he will probably remain a swine the rest of his days.

It is clear that the plaintiff was mentioned ironically as a king who fell so low that he ate grass in the fields and turned into an enormous swine. The published article stated further that there was no hope for his recovery and predicted that the plaintiff would probably remain a swine. According to the decision of the court, the article was clearly ridicule intended to injure the plaintiff's standing in his community. "How could a man be low-

[53] 64 Wis. 198, 200, 25 N.W. 14, 54 Am.Rep. 607 (1885).

er, meaner, or more filthy than to have the character, habits, and ways of a swine?" asked the court.

In Urban v. Helmick[54] on the other hand, the plaintiff was called a hog in a communication to the paper.

The court held, *contra* to the ruling in Solverson v. Peterson, that in calling business men hogs there was no reflection upon the character of their business, a hotel or its accommodations, pointing out that the article "does not charge or impute anything immoral or criminal, nor is it calculated to expose the appellants to public hatred, contempt, or ridicule, or to deprive them of the benefits of public confidence.[55]" It was stated further by the court that the appellants had a legal right to trade in Seattle if they deemed it advantageous and that the comment was nothing more than a hostile comment upon the manner of their doing business and trading wherever they pleased.

The lower court upheld the defendant's demurrer and the state supreme court affirmed the lower court's decision that the words were not libelous *per se*.

Why in one case would calling one a hog or swine be libelous and in another nondefamatory? As illustrated in the contrasting decisions of these two cases, any prediction on the outcome of a suit for libel might be extremely hazardous. However, in a study of these two cases there seems to be some sound reconciliation. In Solverson v. Peterson, the plaintiff was likened to a swine as a lowly beast of the field and as one who had fallen from the status of man to the base level of the animal kingdom. It would seem that there would be no question of doubt as to the defamatory character in this instance. In Urban v. Helmick, comment was that some business men are hogs in that they are selfish and self-seeking, that they are omnivorous and greedy. It would seem here that the particular comment is a metaphorical usage referring to a single characteristic of an individual, rather than a general characterization of the individual.

The classification of words or expressions so far as their possible liability for libel is as follows:

1. Words that are clearly not defamatory.
2. Words that are defamatory in themselves, or *per se*, generally, or according to the commonly recognized use in a special community, or in a specific class.

[54] 15 Wash. 155, 45 P. 747 (1896).

[55] 15 Wash. 155, 159, 45 P. 747 (1896).

3. Words that are defamatory when special circumstances are shown. In some cases this classification may be regarded as words actionable *per se,* and in others actionable *per quod.* This is a twilight zone.

4. Words, ordinarily not defamatory, that become actionable when special damages are shown. This would be clearly libel *per quod.*

Words that are clearly not defamatory involve no liability ordinarily. Harmful nondefamatory statements, however may be actionable when special damages are shown.

Words, the natural and proximate result of which trespasses upon the reputation of another, are actionable *per se.* It is clear that anything which historically is slanderous *per se* would be libelous or actionable *per se* if written or printed; the reverse is not true.

Libelous words are actionable *per se* when they bring the plaintiff into contempt, hatred, or ridicule, or cause him to be shunned by his associates, provided that the words alone are of such common denotation and/or connotation that the court takes judicial notice of their defamatory character. Written or printed words that are actionable *per se* fall into no special or restricted classification, as obtains in the case of words slanderous *per se.*

In a particular community or section of the country, words might be actionable *per se* which would not be actionable in another section of the country.

The following definition of libel *per se* was given in Layne v. Tribune Co.:[56]

> Libel *per se* may be defined as the false and unprivileged publication by letter, newspaper or other form of writing, of unfounded statements or charges which expose a person to hatred, distrust, contempt, ridicule or obloquy, or which tend to cause such person to be avoided, or which have a tendency to injure such person in his office, occupation, business or employment, and which are such that in their natural and proximate consequence, will necessarily cause injury to the person concerned, in his personal, social, official or business relations of life, so that legal injury may be presumed or implied from the bare fact of the publication itself.

On the basis of sound legal reasoning it would seem that words might be actionable *per se* when they are defamatory according to the standards of a reasonable and prudent individual in a par-

[56] 108 Fla. 177, 180, 146 So. 234, 86 A.L.R. 466 (1933).

ticular community, or in a particular class. An expression like "poor white trash" might be a mild comment in a Northern community but it might be really damaging to one's reputation in the deep South. Terms ordinarily regarded as harmless might be injurious in reference to the jargon or technical nomenclature of a particular trade.

Words published that tend to lower the plaintiff in the estimation of his friends [57] or that have a tendency to damage one's social standing [58] have been held libelous *per se*, according to a long line of decided cases. It is actionable *per se* to print and publish that one is "a liar," [59] "a skunk," [60] or "a scandalmonger." [61] Other examples of such words libelous *per se* are: "an infernal villain," [62] "a frozen snake," [63] "a blockhead or fool," [64] "the most artful scoundrel that ever existed," [65] "a hog," [66] "a drunkard," [67] "a humbug," [68] "an itchy old toad," [69] or "a horsethief and counterfeiter." [70]

To publish that a church member had "disturbed the peace of the congregation by circulating false information about the pastor" was held libelous *per se* in Over v. Hildebrand.[71] In Dowie v. Priddle,[72] publications were held libelous *per se* which included the following expressions "vile person," "the very opposite of pious," "a poor, ungrammatical ignoramus," "a heathen man and publican of the worst kind," "scoundrel," "insane fanatic," "poor, insane lunatic," "low, mean coward," "paranoiac," "low, degrad-

[57] Jones v. Roberts, 73 Vt. 201, 50 A. 1071 (1901).

[58] Wood v. Boyle, 177 Pa. 620, 35 A. 853, 55 Am.St.Rep. 747 (1896).

[59] Morgan v. Andrews, 107 Mich. 33, 64 N.W. 869 (1895); Riley v. Lee, 88 Ky. 603, 11 S.W. 713, 11 Ky.Law Rep. 586, 21 Am.St.Rep. 358 (1889); Paxton v. Woodward, 31 Mont. 195, 78 P. 215, 107 Am.St.Rep. 416 (1904).

[60] Massuere v. Dickens, 70 Wis. 83, 35 N.W. 349 (1887).

[61] Patton v. Cruce, 72 Ark. 421, 81 S.W. 380, 65 L.R.A. 937, 105 Am.St. Rep. 46 (1904).

[62] Bell v. Stone, 1798, 1 Bos. & Pul. 331.

[63] Hoare v. Silverlock, 1848, 12 Q. B. 624.

[64] Krug v. Pitass, 162 N.Y. 154, 56 N.E. 526, 76 Am.St.Rep. 317 (1900).

[65] Rutherford v. Evans, 6 Bing. 451 (1830).

[66] Solverson v. Peterson, 64 Wis. 198, 25 N.W. 14, 54 Am.Rep. 607 (1885).

[67] Giles v. State, 6 Ga. 276 (1848).

[68] Ramharter v. Olson, 26 S.D. 499, 128 N.W. 806, Ann.Cas.1913B, 253 (1910).

[69] Villers v. Monsley, (1769) 2 Wilson's Reports, K.B., 403.

[70] Nelson v. Musgrave, 10 Mo. 648 (1847).

[71] 92 Ind. 19 (1883).

[72] 216 Ill. 553, 75 N.E. 243 (1905).

ed person, lewd and depraved," and "teacher of lewd, adulterous and polygamous practices."

To sensationalize the poverty of a former gentlewoman so as to bring her into ridicule and contempt [73] or to make a joke out of the desertion of a bride on her wedding day [74] have been held libelous on the ground that these stories injured the social standing of the persons defamed.

A statement may be libelous though it does not impute immoral conduct especially if the whole tenor of the article is to ridicule the plaintiff. In Snyder v. the New York Press,[75] the story in question concerned the serving of a writ to a woman in the bathtub. The court in giving its decision pointed out that the story had a direct tendency to lower her in the estimation of the community, despite the fact that it did not charge her with immoral conduct or impute immoral character. The trial court's ruling sustaining the defendant's demurrer was reversed and leave granted to plead over. The action was based on the following story:

COURT HEAR HOW WOMAN
IN BATH TUB GOT SUBPOENA

Process Server Just Walked in to Hand Papers to Her

Her Screams Drove Him Out

Naive Maid Responsible for Embarrassing Situation of Realty Man's Wife

An Irish maid's mistake, it was brought out yesterday in the City Court before Judge LaFetra, put Mrs. Herbert R. Snyder, wife of a realty man of No. 312 West 109th Street in an embarrassing situation several days ago. A process server was permitted to enter Mrs. Snyder's bath room when she was in the tub. That enabled him to serve on her a subpoena in

[73] Moffatt v. Cauldwell, 3 Hun 26, 5 Thomp. & C. 256 (1874).

[74] Kirman v. Sun Printing & Pub. Ass'n, 99 App.Div. 367, 91 N.Y.S. 193 (1904).

[75] 137 App.Div. 291, 121 N.Y.S. 944 (1910).

supplementary proceedings on a judgment of $40 obtained by butcher against her husband.

"That horrid process server," Mrs. Snyder blushingly explained in court, "walked right into my bath room to serve his subpoena, and I was in the bath tub."

The case before the court was to have been a motion to have the subpoena vacated on the ground that it was impossible for the process server to identify Mrs. Snyder in the circumstances. It was shown that the man had retreated when he saw Mrs. Snyder in the tub because she started to scream. He served the paper, however, by giving it to a hand which had extended from the bath room. The fact that the hand was attached to a naked arm led the man to believe he was giving the paper to the woman whom he surprised in the tub, and he was sure that woman was Mrs. Snyder. Thompson and Ballantine of No. 27 William Street, counsel for Emil Oppenheimer, the judgment creditor, refused to tell the name of the process server, suggesting it would be harmful to the man in his business if his identity were revealed.

As the lawyers told the story to Judge LaFetra the subpoena server reached the Snyder home shortly after Snyder had gone down town to business. Mrs. Snyder was taking her morning bath when the bell rang. Her Irish maid, mentioned in court only as Bridget, opened the door. The process server walked into the flat and insisted on seeing Mrs. Snyder.

"But sir," the girl said, "she's in the bath tub." "That doesn't make any difference," the man replied, "I'm sure she's anxious to see me."

The maid took him at his word, led him to the bath room, and threw open the door. The man stepped in and then saw his predicament. Mrs. Snyder impressed it on him further by screaming excitedly. The man dodged out of the room, pulling the door after him, but insisted that Mrs. Snyder come out of the tub and get the paper. She was only too willing to do that, so she could slam the door and lock it.

The libel of a man so as to injure his reputation among his fellows, or his social standing, is illustrated in Zbyszko v. New York American, Inc.[76] The defendant newspaper published an article headed, "How Science Proves Its Theory of Evolution," in which there was outlined a series of progressive steps of the development of the human being from earlier, rude, and simple beginnings. The body of the article did not mention the plaintiff in any way, but stated:

> Science does not believe that gorillas or other apes are the great-grandfathers of man. They are set down as remote

[76] 228 App.Div. 277, 239 N.Y.S. 411 (1930).

> cousins of mankind rather than direct ancestors. Gorilla evolution and human evolution split apart from a common ape-man parent millions of years ago. The gorilla is probably closer to man, both in body and mind, than any other species of ape now alive. The general physique of the gorilla is closely similar to an athletic man of today, and the mind of a young gorilla is much like the mind of a human baby.

Accompanying the article itself were two illustrations, entitled, "Stanislaus Zbyszko, the Wrestler, Not Fundamentally Different from the Ape in Physique," and "A mounted specimen of the Great Kivu Gorilla in Lord Rothschild's private museum at Tring, Hertsfordshire, England."

The plaintiff complained that the pictures were so arranged that the inference was that he resembled the hideous gorilla and that the impression was created in the minds of readers that the said gorilla and the plaintiff were alike in many important respects. He asserted that he was a wrestler and business man and that he associated both physically and intellectually with many important persons in this country and abroad, and that he was brought into public contempt and disgrace and was caused to be shunned by his friends, neighbors, relatives, and his wife. There were no allegations of special damage. The court held that the publication was libelous *per se*.

Ruling adversely on the lower court's action dismissing the complaint, the higher court stated:

> We think that the publication is libelous *per se*, because its tendency is to disgrace the plaintiff and bring him into ridicule and contempt and that, therefore, it is actionable without alleging special damages.[77]

Any publication imputing the commission of a crime connoting moral turpitude or demanding under the law corporal or infamous punishment is actionable *per se* when such publication is false or is not protected by qualified privilege. It was stated in Mackin v. U. S.,[78] that what may be considered infamous punishment may change with public opinion from one age to another, but that for more than a century imprisonment at hard labor in a state prison or penitentiary has been regarded in both England and America as infamous punishment. Any indictable offense at common law was regarded as slanderous *per se*.

[77] 228 App.Div. 277, 278, 239 N.Y.S. 411 (1930).

[78] 117 U.S. 348, 6 S.Ct. 777, 29 L.Ed. 909 (1886).

The limits of the law of libel respecting the imputation of a criminal offense are much broader than the limits for slander. Under the law of libel the charge of any offense whatsoever that tends to blacken one's character or to subject him to contempt or ridicule is libelous *per se*.[79] The test is whether the tenor of the article naturally imports a criminal or disgraceful charge.[80] It is submitted therefore that while ordinarily an unjustified imputation of a minor misdemeanor would not be actionable *per se* under the law of slander, it would be actionable under the law of libel.

To print without justification or privilege that one is arrested for larceny [81] or that a person is held in jail on forgery charge [82] would be libelous *per se*. To impute another with the commission of a felony is libelous.[83]

It is libelous further to impute without legal cause the commission of blackmail,[84] bigamy,[85] perjury,[86] assault,[87] or murder.[88]

To print falsely that a person committed suicide would be clearly actionable *per se*. Suicide in some jurisdictions is regarded as a homicide, and an attempt at suicide a misdemeanor; suicide in the public mind involves moral fault. In Dall v. Time, Inc.,[89] action was brought on the following:

> FOREIGN NEWS
> FRANCE
> Son-in-law
> "Yesterday Curtis B. Dall, son-in-law of President Roosevelt, shot himself in the White House in the presence of his

[79] Walker v. Bee-News Pub. Co., 122 Neb. 511, 240 N.W. 579 (1932).

[80] Mildenberger v. Flemming, 131 Misc. 919, 229 N.Y.S. 293 (1928).

[81] Thomas v. Bowen, 29 Or. 258, 45 P. 768 (1896).

[82] Oklahoma Pub. Co. v. Givens, 67 F.2d 62 (C.C.A.Okl.1933).

[83] Sanders v. Times-Picayune Pub. Co., 168 La. 1125, 123 So. 804 (1929).

[84] Town Topics Pub. Co. v. Collier, 114 App.Div. 191, 99 N.Y.S. 575 (1906).

[85] Taylor v. Tribune Pub. Co., 67 Fla. 361, 65 So. 3 (1914).

[86] Milan v. Long, 78 W.Va. 102, 88 S.E. 618 (1916).

[87] Walters v. Sentinel Co., 168 Wis. 196, 169 N.W. 564 (1918); Lundin v. Post Pub. Co., 217 Mass. 213, 104 N. E. 480, 52 L.R.A.,N.S., 207 (1914).

[88] Houston Chronicle Pub. Co. v. Quinn, 184 S.W. 669 (Tex.Civ.App. 1916); Shiell v. Metropolis Co., 102 Fla. 794, 136 So. 537 (1931); Reid v. Sun Pub. Co., 158 Ky. 727, 166 S.W. 245 (1914).

[89] 252 App.Div. 636, 300 N.Y.S. 680 (1937), aff. 278 N.Y. 635, 16 N.E.2d 297 (1938), rearg. den. 278 N.Y. 718, 17 N.E.2d 138 (1938). See also Cady v. Brooklyn Union Pub. Co., 23 Misc. 409, 51 N.Y.S. 198 (1898).

> estranged wife and Mrs. Roosevelt. He died later in the day."
>
> If such an event were so briefly reported in the U. S. Press, neither readers nor publishers would be satisfied. Yet almost an exact parallel of that tragedy occurred in the Hotel Continental apartment of Premier Gaston Doumergue last week. Mention was limited to a few slender paragraphs in New York newspapers and a close-mouthed silence on the part of French officialdom.

Details of the suicide of Enzo de Bonze, son-in-law of Prime Minister of France, Gaston Doumergue, in the presence of the minister's wife, were then given.

The defense to the effect that the lead was purely fictitious, a so-called "Dutch" or feature lead was to no avail.

To be libelous there need not be a categorical certainty that on a crime charged or insinuated there would be an indictment. To place the insinuation in the opinion of a detective or other person does not free the defendant in a libel case from liability. In Haynes v. Clinton Printing Co.,[90] the defendant published relative to the commission of a crime, a story in part as follows:

> A. S. Haynes, a prominent citizen and town clerk of Bolton, it is believed, has fallen under the suspicion of the officers of the law, and, rightly or wrongly, the evidence will tend toward his possible connection with Mr. Cohen's death. It is hardly probable that the government can go so far as to establish any actual guilt of this person so far as the alleged murder is concerned, but it is said it will be shown that at least one man existed with a motive for the crime, whether or not he committed it.

The higher court in holding this story libelous stated that it needed no argument to show that such a publication tends, in the gravest way, to the injury of the reputation of the plaintiff in his community.

To charge a woman with unchastity or adultery is actionable *per se*;[91] in fact, any inference that a woman is a whore, a prostitute, or an adulteress is regarded as a clear violation of the right of reputation when such an appellation is not true or privileged. At early common law it was not slanderous *per se* to charge a woman with adultery,[92] and any recovery had to be made on the

[90] 169 Mass. 512, 48 N.E. 275 (1897).

[91] Ballinger v. Democrat Co., 203 Iowa 1095, 212 N.W. 557 (1927); Barber v. St. Louis Dispatch Co., 3 Mo.App. 377 (1877).

[92] Martin v. White, 188 Ky. 153, 221 S.W. 528 (1920).

basis of proving special damages. Unless there is statutory provision making such slander of a woman actionable, the same rule obtains today in so far as oral defamation is concerned. But the greater possibility of widespread diffusion of false information about a woman's morals has been recognized by the law and today any written or printed statement charging without foundation that a woman is immoral is generally regarded as actionable *per se.*

Publication of a story stating that a woman is the mistress of a certain man [93] or a story charging intimacy with a young elocutionist,[94] or a statement that a female of previous good character traveled with a married man and that they were turned out of a hotel in another town [95] is libelous.

It was held in Thibault v. Sessions,[96] that a charge that a teacher had taken indecent liberties with the pupils of the school was actionable *per se.* In Farrington v. Star Co.,[97] the plaintiff's picture was used with a story of another individual of the same family name in connection with a seduction charge; this presentation clearly libeled the plaintiff, the court held.

The charge of indiscretion need not be pronounced; it may be implied by words, signs, or pictures; any statement fairly imputing immoral conduct is actionable.[98] How far the inference may be made is seen in the facts in Stafford v. Morning Journal Assn.[99] This case disclosed the publication of the following advertisement:

> Le Huray Sisters, Blanche, Stella, and Allien, just from Paris; Massage, French style; Love secrets; How to get a husband; Inclose stamp; Valuable information for ladies by aid of cards. * * *

The court in affirming the lower court's judgment for the plaintiff held that this advertisement was libelous *per se.*

To impute to another a loathsome, infectious, or contagious disease falsely or without qualified privilege is actionable *per se.* Under this class of defamation the plague, leprosy, and venereal

93 Dempster v. Mann, 157 F. 319 (C.C.N.Y.1907).

94 Collins v. Dispatch Pub. Co., 152 Pa. 187, 25 A. 546, 34 Am.St.Rep. 636, 31 Wkly.Notes Cas. 316 (1893).

95 Indianapolis Journal Newspaper Co. v. Pugh, 6 Ind.App. 510, 33 N.E. 991 (1893).

96 101 Mich. 279, 59 N.W. 624 (1894).

97 244 N.Y. 585, 155 N.E. 906 (1927).

98 Thayer v. Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933).

99 142 N.Y. 598, 37 N.E. 625 (1895).

disease have been widely accepted as slanderous *per se,* and therefore when printed or written become libelous *per se.* The essence of such a charge is that a person with such a disease or the reputation of having such a disease will be shunned or avoided by society. Unless special damages are proved, it would not be libelous to print that one had had a contagious or loathsome disease; it is essential that the statement be that the person has the disease at the time the article is published.

To charge without legal cause that one has leprosy was held libelous in Lewis v. Hayes;[100] the imputation of venereal disease was held libelous in King v. Pillsbury.[101]

When the *New York Sun* published falsely that an educator was of unsound mind, the paper was held for damages for libel.[102] Any imputation of insanity would be actionable,[103] although to state in a criticism that one is "queer" would not in itself be held libelous, for any normal person may be regarded as queer in some particular category.

Interest in government, public officers, and candidates for public office gives the press wide latitude in reporting and commenting upon public affairs. Unless the article is protected under truth of the statement, qualified privilege, or fair comment, any defamatory statement in the press about a public officer, an officer of a quasi public institution, or a candidate for public office, is actionable. It has been held that it is not libelous to comment adversely upon the government itself.[104]

Criticism of a public officer, the officer of a quasi public institution, or a candidate for public office may extend to a criticism of his private conduct or private character in so far as his private conduct or character affects his public activity. In the reported cases there is some confusion about the length the press may go in making an attack upon private character or private business of the public officer or candidate. One line of cases holds that the private affairs and character of a public man are a fair subject of comment so long as the comment is based on fact, reasonable basis of belief, and absence of malice. Another

[100] 165 Cal. 527, 132 P. 1022, Ann. Cas.1914D, 148 (1913); Simpson v. Press Pub. Co., 33 Misc. 228, 67 N.Y. S. 401 (1900).

[101] 115 Me. 528, 99 A. 513 (1918).

[102] Totten v. Sun Printing & Pub. Ass'n, 109 F. 289 (C.C.N.Y.1901).

[103] Taylor v. McDaniels, 139 Okl. 262, 281 P. 967, 66 A.L.R. 1246 (1929).

[104] City of Chicago v. Tribune Co., 307 Ill. 595, 139 N.E. 86, 28 A.L.R. 1368 (1923).

line of cases holds that falsehood about a public character is not protected. Further discussion of this phase of defamation is given in the Chapter on Fair Comment.

It has been held that it is libelous to charge a public officer unfit for office[105] or to charge neglect of official duty, incompetency, or malfeasance.[106] To publish that a person is a double-crosser in politics is libelous[107] as also is any charge that impeaches honesty and integrity.[108] To state that a state senator is an alien and ineligible when the facts do not justify such a statement was held actionable in Englund v. Townley.[109] In Atlanta Journal Co. v. Pearce,[110] it was held libelous for the newspaper to publish falsely that the plaintiff, who was mayor of the city and also superintendent of a cotton mill, offered gross indignities to a woman lecturer because of her statements on child labor.

It has been held libelous to charge that a candidate for reelection as sheriff obtained money upon false expense items,[111] that a city tax collector was dishonest and corrupt,[112] that a deputy sheriff arrested peaceable and innocent men as tramps merely to collect additional fees,[113] that a chief of police stole papers from a manufacturing plant,[114] or that a police officer was drunk on duty.[115]

To state that a candidate for public office had withdrawn from the race on the promise of others, that if they were elected would give him an appointive office, was declared libelous on the ground that such an agreement was illegal.[116] Statements that plaintiff originated and circulated false statements about a can-

[105] McAvoy v. Press Pub. Co., 114 App.Div. 540, 99 N.Y.S. 1041 (1906); Arizona Pub. Co. v. Harris, 20 Ariz. 446, 181 P. 373 (1919).

[106] Oklahoma Pub. Co. v. Tucker, 124 Okl. 202, 254 P. 975 (1927); Hendrix v. Mobile Register, 202 Ala. 616, 81 So. 558 (1919).

[107] Peck v. Coos Bay Times Pub. Co., 122 Or. 408, 259 P. 307 (1927).

[108] Morley v. Post Printing & Publishing Co., 84 Colo. 41, 268 P. 540 (1928).

[109] 43 N.D. 118, 174 N.W. 755 (1919).

[110] 145 Ga. 694, 89 S.E. 759 (1916).

[111] Farley v. McBride, 74 Neb. 49, 103 N.W. 1036 (1905).

[112] Brown v. Journal Newspaper Co., 219 Mass. 486, 107 N.E. 358 (1914).

[113] Bourreseau v. Detroit Evening Journal, 63 Mich. 425, 30 N.W. 376, 6 Am.St.Rep. 320 (1886).

[114] Hansen v. Parks, 139 Wash. 241, 246 P. 584 (1926).

[115] O'Brien v. Times Pub. Co., 21 R.I. 256, 43 A. 101 (1889).

[116] Hand v. Willard F. Bailey Co., 103 Neb. 450, 172 N.W. 356 (1919).

didate,[117] that a lawyer who was a candidate for congress was a pettifogging shyster,[118] and that certain candidates were corrupt [119] have been held libelous *per se*.

A newspaper article which, in commenting upon a candidate, stated that he was a most unworthy choice [120] and a statement that the plaintiff was a candidate for seven offices at the last town election were held not libelous.[121]

Printed words which reflect damagingly on one's trade, occupation, or profession are libelous *per se*.[122] Cases showing the breadth of the possibilities of libel against one in his trade, business or profession include: to state that a clergyman came to divine service in a towering passion and that his conduct would make infidels of his congregation,[123] to publish that an architect's appointment to prepare plans for a public building were no less than a public calamity,[124] to publish that a schoolmaster kept girls after school so that he could court them,[125] to print and distribute a statement that a physician used unprofessional methods in the treatment of a case,[126] to publish that a jockey rode horses unfairly and dishonestly,[127] or to publish that a tradesman advertised inferior goods thus deceiving the public.[128]

In Van Lonkhuyzen v. Daily News Co., [129] a minister was characterized as "an interloper, a meddler, and a spreader of distrust, discontent, and sedition"; the trial court found for the defendant but the case was reversed and a new trial

[117] Sheibley v. Huse, 75 Neb. 811, 106 N.W. 1028, 13 Ann.Cas. 376 (1906).

[118] Bailey v. Kalamazoo Pub. Co., 40 Mich. 251 (1879).

[119] Niblo v. Ede, 35 S.D. 359, 152 N.W. 284 (1915).

[120] Duffy v. New York Evening Post Co., 109 App.Div. 471, 96 N.Y.S. 629 (1905).

[121] Peck v. Wakefield Item Co., 280 Mass. 451, 183 N.E. 70 (1932).

[122] Lyman v. New England Newspaper Pub. Co., 286 Mass. 258, 190 N. E. 542, 92 A.L.R. 1124 (1934).

[123] Walker v. Brogden, 12 L.T. 495 (1865).

[124] Clifford v. Cochrane, 10 Ill.App. 570 (1882).

[125] Spears v. McCoy, 155 Ky. 1, 159 S.W. 610, 49 L.R.A.,N.S., 1033 (1913).

[126] Marion v. Courier Pub. Co., 125 Ill.App. 349 (1906).

[127] Wood v. Earl of Durham, 21 Q. B. 501 (1888).

[128] Davey v. Davey, 22 Misc. 668, 50 N.Y.S. 161 (1898), affirmed 36 App. Div. 640, 56 N.Y.S. 1106 (1899); motion for leave to appeal denied 39 App.Div. 638, 57 N.Y.S. 1137 (1899).

[129] 195 Mich. 283, 161 N.W. 979, L.R.A.1917D, 855 (1917).

granted by the Michigan Supreme Court on the ground that the language was libelous *per se*. In Pentuff v. Park,[130] the court held that language charging a minister with being unmannerly, discourteous, and ignorant was libelous *per se*. When a newspaper criticized a farmer and organizer so as to hold him up to public hatred and contempt, thus affecting his business, the publication was held libelous in Stevens v. Morse.[131] Printing an article which charged an attorney with betraying confidence and extortion [132] or publication of charges that an attorney induced a girl to sign a false affidavit [133] has been declared libelous *per se* as affecting a lawyer in his professional reputation. To state in print that a physician is a quack,[134] or to publish falsely that a dentist has committed suicide, is libelous *per se*.[135]

Any implication of fraud or dishonest conduct is libelous *per se* to either an individual or corporation.[136] To charge a teacher with having an unsound mind [137] or to state that a person is insane when there is no legal justification or privilege is clearly libelous *per se*, as would be also a charge that a reporter betrayed confidence [138] or that an author is a literary freak or museum piece.[139]

An authoritative case in point is Stevens v. Morse.[140] The *River Falls Journal* published an article, in part as follows:

> Pat Stevens, St. Croix county, harangued a meeting in Erin lately, and wheedled out of his audience a few signatures to a set of resolutions which called for a farmers "strike" September 1. Pat told his farmer friends a lot of "terrible" things, and then explained just how everything could be rem-

[130] 194 N.C. 146, 138 S.E. 616, 53 A. L.R. 626 (1927).

[131] 185 Wis. 500, 201 N.W. 815 (1925).

[132] Mannix v. Portland Telegram, 136 Or. 474, 297 P. 350 (1931).

[133] Corsello v. Emerson Bros., 106 Conn. 127, 137 A. 390 (1927).

[134] Martin v. The Picayune, 115 La. 979, 40 So. 376, 4 L.R.A.,N.S., 861 (1906); Brinkley v. Fishbein, 134 Kan. 833, 8 P.2d 318 (1932).

[135] Cady v. Brooklyn Union Pub. Co., 23 Misc. 409, 51 N.Y.S. 198 (1898).

[136] Farmers' Life Ins. Co. v. Wehrle, 63 Colo. 279, 165 P. 763 (1917); Gordon v. News-Journal Co., 6 W.W.Harr. 396, 176 A. 657 (1935).

[137] Totten v. Sun Printing & Publishing Ass'n, 109 F. 289 (C.C.N.Y. 1901).

[138] Tryon v. Evening News Ass'n, 39 Mich. 636 (1878).

[139] Triggs v. Sun Printing & Publishing Ass'n, 179 N.Y. 144, 71 N.E. 739, 66 L.R.A. 612, 103 Am.St.Rep. 841 (1904).

[140] 185 Wis. 500, 201 N.W. 815 (1925); see also Williams v. Hicks Printing Co., 159 Wis. 90, 150 N.W. 183 (1914).

> edied. Not many, if any, real farmers paid him the slightest attention, but of course that wouldn't bother Pat, for he got his satisfaction out of being *the* speaker at a meeting. And it is surprising to note that Pat has been criticized for presumption. One critic says that while "Pat is one of the best little talkies in the county," he is also, "be it known, one of the poorest farmers anywhere." If everyone farmed as Pat does, there would be no need of talking about 'curtailing production', because there'd be no production to curtail." But his critics should know by this time that Pat's very ignorance of the fundamentals and the practise of his subject puts him in line for promotion as a wizard and prophet according to present day standards in politics. In Wisconsin the political slogan is "If Mendota don't get 'em, Madison must."

Stevens, both a farmer and a professional organizer, sued for libel. The trial court overruled a general demurrer and the order was affirmed by the supreme court. The court in its opinion pointed out that a careful reading could not fail to impress the reader with the thought that it did not constitute fair criticism. It noted that Mendota is a state institution for the insane, that the article charged him with being an unsuccessful farmer and being utterly ignorant of the fundamentals and practice of the business, and that what was said of Stevens as a farmer was equally applicable to him in his work as an industrial organizer. "The article," said the court, "clearly has a tendency to hold the plaintiff up to public ridicule, hatred, and contempt, and it also affects him in his business as a farmer, and in the other occupations alleged in the complaint. It is therefore libelous *per se*." [141]

When words defame a corporation, they are equally actionable in themselves without proof of special damages, provided the defamatory statement injures the corporation in respect to its integrity, its ability to carry on business, or its credit, as was decided in Maytag Co. v. Meadows Mfg. Co.[142]

Defamation against a business or corporation is not to be confused with defamation against title or goods, a form of libel known as slander of title or trade libel which is discussed in the Chapter on Libel to Property.

[141] 185 Wis. 500, 503, 201 N.W. 815 (1925).

[142] 45 F.2d 299, at page 302 (C.C.A. Ill.1930), certiorari denied, 283 U.S. 843, 51 S.Ct. 489, 75 L.Ed. 1452 (1931). See also: Dupont Engineering Co. v. Nashville Banner Pub. Co., 13 F.2d 186 (D.C.Tenn.1926); Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, 17 F.2d 255, 52 A.L.R. 1187 (C.C.A.Minn.1927); Ukman v. Daily Record Co., 189 Mo. 378, 88 S.W. 60 (1905).

Words normally innocent in themselves may become libelous when special circumstances are shown. It would seem that some courts are reluctant to hold that some statements are not libelous even though no special damages are shown; accordingly it has seemed that the inclusion of special circumstances has been permitted in order to give redress where justice would seem to dictate.

Courts are not always consistent in their distinctions as to what is libelous *per se* and what is libelous *per quod*. The term libel *per quod* has been applied to designate libel other than libel *per se*. On this theory, any statement that can be made out as defamatory with the proof of special circumstances is libel *per quod* and damages are presumed. Another theory maintains on good authority that a libel *per quod* is one in which special damages must be proved. In England special damages need not be proved in any case of libel; damages will be presumed irrespective of whether the libelous statement is clear on its face or shown to be libelous by proof of special circumstances.[143] This English view seems a sensible rationalization of what has been a confusing problem of legal definition as interpreted by American courts.

Confusion in the use of these technical terms is recognized by some courts themselves. In Kee v. Armstrong, Byrd & Co.,[144] the court stated:

> No writer has attempted to lay down any strict rule of law, which may be followed by the courts in distinguishing between publications that are "libelous" and those termed "libelous *per se*." We have been unable to find any writer who has defined the term "libelous *per se*" but our court has often referred to publications as being "libelous" and those "libelous *per se*."

In Oklahoma Pub. Co. v. Gray,[145] the court stated:

> There is no fixed rule by which the court can determine whether or not a statement is libelous *per se*, and the statement must be examined before it can be determined whether or not it is libelous *per se*.

If the alleged libel is not the natural and proximate result of the words published either with or without special circum-

[143] Fraser, H., Libel and Slander (7th Ed.) p. 24; Ogden, W. B., Libel and Slander (6th Ed.) p. 309.

[144] 75 Okl. 84, 182 P. 494, 496, 5 A.L.R. 1349 (1919).

[145] 138 Okl. 71, 280 P. 419, at page 421 (1929).

stances being shown, special damages should be proved to merit recovery.

Words libelous *per se,* when special circumstances are shown, are aptly illustrated in the case of Sydney v. MacFadden Newspaper Pub. Corporation.[146] The plaintiff was a married woman, the wife of Basil Sydney, and an actress of good standing, playing under the stage name of Doris Keane. On December 15, 1924, the *New York Evening Graphic,* owned by the defendant corporation, published the plaintiff's photograph and in connection therewith stated:

> Doris Keane is, according to rumor, "Fatty" Arbuckle's latest lady love. Doris is pretty and "Fatty" is cross, or was when some of those prying newspapermen attempted to interview him about the reported match.
>
> Maybe Roscoe "Fatty" Arbuckle is going to marry Doris Keane and maybe he is not.
>
> "Fatty" was noncommittal when interviewed as he served barbecue to Gouverneur Morris and Mrs. Morris and another guest, said to have been Doris.
>
> The one time funny man of the screen was all dressed up in a chef's costume and performed merry antics for the picnic party yesterday at Point Lobos, when the newspapermen "horned in."
>
> "Maybe I am and maybe I am not. Meantime beat it while the beating is good and don't try to catch me in that black box or I'll do a movie comedy with this steak," Fatty tenderly announced.
>
> Morris chimed in with remarks about the newspaper persons butting in on a private party.
>
> The identity of the fourth member of the party was guarded, but little Doris had been visiting at the Morris home before the barbecue.

No special damage was alleged; the complaint had to stand or fall upon the question of defamation. The opinion stated:

> Any written or printed article is libelous or actionable without alleging special damages if it tends to expose the plaintiff to public contempt, ridicule, aversion, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.

Such a statement as that published by the defendant was held to hold Miss Keane (Mrs. Sydney) up to ridicule and contempt;

[146] 242 N.Y. 208, 151 N.E. 209, 44 A.L.R. 1419 (1926).

and the natural tendency of the statement would be to disgrace her.

In this case, the majority opinion of the court was that the statement published was libelous *per se;* a dissenting opinion held that there was no libel, because the words were not libelous without special circumstances being shown and because no special damage was alleged in the complaint as would normally be necessary in the case of libel *per quod.*

In Gates v. New York Recorder Co.,[147] the plaintiff was described as a dashing blonde, 20 years old, and was said to have been a concert-hall singer and dancer at Coney Island. In itself this statement which was used in describing a wedding would not be libelous *per se.* But in light of special circumstances at the time of publication, the court regarded the statement as libelous *per se,* for at that time certain concert halls at Coney Island were not regarded as reputable. The judgment for the plaintiff was given without proof of special damages; the defamation was classed by the court as libelous *per se.*

To show the extent that the courts will go in determining what is libelous *per se,* it is well to review briefly the facts of the Hughes v. Samuels Bros.[148] case, although it does not pertain to a journalistic publication. The defendant in that case composed and published concerning the plaintiff a card stating: "Bear in mind our Undertaking department. Satisfaction guaranteed. H. L. Hughes." The card, purporting to be a publication of H. L. Hughes, an undertaker, was mailed to the address of one Albert Cattermole of Storm Lake, whose wife lay seriously ill in a hospital, a fact of which the defendants had full knowledge at the time they prepared and mailed the said statement, it was alleged. The question presented to the court was: "Is the publication charged to have been made by the defendants libelous *per se?*"

The court in its opinion pointed out that if the statement published in its natural effect upon the mind, produced hurt to the good name, fame, and reputation of the person about whom the publication was made, the statement would be defamatory, adding further:

> In the contemplation of law, reputation is a delicate plant, withered by the breath of scandal. Any publication which imputes to another conduct which right-minded men condemn,

[147] 155 N.Y. 228, 49 N.E. 769 (1898). R.A.1917F, 1088 (1917); see 30 Harvard Law Review 292.

[148] 179 Iowa 1077, 159 N.W. 589, L.

> whether the conduct involve a crime, moral turpitude, or any conduct in life, purpose or manner of living which the common sense of right-thinking men condemns, is presumed in law to have injuriously affected the reputation of the person so assailed, and by such injury, to have caused him some damage. It follows, therefore, that libel is an assault upon character resulting in some injury to the reputation.[149]

The demurrer sustained upon the original complaint was overruled, thus in effect indicating that the action upon the part of the defendants was such as would warrant a trial on the merits of the case.

The Hughes v. Samuels Bros. case illustrates the principle that courts are relatively broad in their interpretation of what is libelous *per se*. If a newspaper publisher in his job printing plant printed such a card as was used in this case and aided in any way in concept and dissemination, he might become liable.

It is submitted that although the holding in this case was that the words used were libelous *per se*, the special circumstances of the case were shown, that is, the distribution to the family in which there was serious illness at the time and the fact that both the plaintiff and defendant were in the furniture and undertaking business. The libel would not be libel *per se* in the respect that the words were libelous in themselves, but were libelous only when the special circumstances were shown; however, as a matter of legal theory in the field of defamation, it would seem that words as used under special circumstances would be libelous without proof of special damage; in that respect, the libel might be regarded as libel *per se*.

The cases involving the use of "Negro" as applied to a white man are not consistent, even in the Southern part of the United States. In Jones v. R. L. Polk & Co.,[150] the facts disclose that in the Selma, Alabama, city directory the plaintiff's name was used with an asterisk before it, thus denoting the person so indicated a member of the colored race, while in fact the person was of pure Caucasian descent. Judgment given the defendant in the trial court was affirmed upon appeal. The court stated:

> The general statement that a person is "colored" imputes no crime, no misconduct, no mental, moral, or physical fault for which one may be justly held accountable to public opinion; and yet in the particular social conditions prevailing in this jurisdiction, to publish of and concerning a white woman

[149] 179 Iowa 1077, 1086, 1087, 159 N.W. 589, L.R.A.1917F, 1088 (1917).

[150] 190 Ala. 243, 67 So. 577 (1915).

> that she is colored, meaning that she is a negro, or has negro blood in her veins, is libelous within the definition of libel commonly found in books. Whether, then, such a publication is libelous in any particular case depends upon circumstances. Here then is room for innocent mistakes.[151]

The evidence showed that the error was made by the printer and that when the defendant discovered the error she made an immediate correction. This explanation satisfied the jury that the error was neither reckless nor with knowledge that the statement was libelous. Under the normal ruling of liability for defamation, such innocent error would not absolve the defendant from liability except in mitigation of damages.

To call a white person a Negro has been held libelous *per se*.[152] The theory upon which this liability is based is that in certain Southern states there are two distinct classes of society, white and Negro; each member of each class has a right to choose his friends and associates and to be affiliated with his class. To be labeled a member of the Negro race when in truth the person is a member of the Caucasian, it has been held, is defamatory.

The reasons for such a distinction between the Caucasian and Negro races in the United States are largely historical and geographical. As was stated in Strauder v. West Virginia,[153] following the War between the States:

> The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted.

While the Fourteenth Amendment to the United States Constitution brought political equality between these races, the courts have recognized over the years nevertheless that some social differences existed.[154]

The *Charleston News & Courier* used the following story:

[151] 190 Ala. 244, 67 So. 577 (1915).

[152] Flood v. News & Courier Co., 71 S.C. 112, 50 S.E. 637 (1905); Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 So. 970 (1900).

[153] 100 U.S. 303, 306, 25 L.Ed. 664 (1880).

[154] Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) "The object of the Fourteenth

A SUIT FOR DAMAGES

A. M. Flood Wants One Thousand Dollars on Account of Being Injured by Trolley Car

Augustus M. Flood, colored, through attorneys, Young & Young, filed suit yesterday in the Court of Common Pleas against the Charleston Railway, Gas & Electric Company for damages for alleged injuries received from being injured by a street car operated by the defendant company.

The trial court sustained the defendant's demurrer, but the higher court reversed the decision, holding the story defamatory and noting:

> To call a white man a negro affects the social status of the white man so referred to. * * * The statute law of this state forbids the association of the two races in such way as excludes the negro from white society, and vice versa. By the miscegenation statutes, the intermarriage of the two races is forbidden and made a crime. By the statute the railroads of the state are required to furnish separate coaches for the

amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinction based upon color or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. * * * The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities—a mutual appreciation of each other's merits and a voluntary consent of individuals. * * * Legislation is powerless to eradicate racial instincts or abolish distinctions based upon physical differences, and attempts to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other, civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."

People ex rel. King v. Gallagher, 93 N.Y. 438, 448, 45 Am.Rep. 232 (1883)—"This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all functions respecting social advantages with which it is endowed."

two races, and it is a misdemeanor for any railroad employe to permit a colored passenger to occupy the car for white people, or a white passenger the car for colored people. White children and colored children are forbidden to attend the same school.[155]

A newspaper article that an Arab wanted an American woman to be his chief wife, that the Arab would buy the girl from her parents in accordance with the Arabic custom, and that the plaintiff was a friend of the Arab who would make contact for him with any prospective brides, was held libelous *per se*.[156] The unusual request of the Arab was printed as follows in the *Birmingham Post:*

ARABIAN SHEIK ASKS FRIEND HERE TO BUY HIM AN AMERICAN GIRL FOR HAREM

Roebuck Man Urged to look for "Chief Wife" in Birmingham

The pleasure, privilege, and honor of being chief-wife in an Arab sheik's harem awaits some Birmingham or Alabama maiden, it was revealed today.

The Hon. Fareed J. Iman, member of an old aristocratic Arabian family, has asked a friend in Birmingham to find him a wife. And the lucky girl would be chief-wife in his four-wife harem.

Sheik Iman's American friend is Lytle White of Roebuck, who made the Arabian's acquaintance, while touring in Asia Minor in the summer of 1930.

Mr. White spent two weeks in the home of the Arabian in Jerusalem and also visited with the latter's relatives. Ever since that time the two have corresponded regularly.

In a recent letter, Mr. Iman, who is 29 years old and fears he may reach 30 before he obtains a chief-wife to his taste, has asked his Birmingham friend to help him out. And in accordance with Arabian customs, he is ready to purchase a suitable girl from her parents.

Arab sheiks feel, explained Mr. White, who has made a study of Arabian customs, that they must obtain a wife by the time they become 30 years of age or they won't visit them. And not to have visitors would be the greatest affront to Arabian hospitality, he explains.

[155] Flood v. News & Courier Co., 71 S.C. 112, 117, 118, 50 S.E. 637 (1905).

[156] White v. Birmingham Post Co., 233 Ala. 547, 172 So. 649 (1937).

Mr. Iman, according to Mr. White, is the descendant of an influential line of Arab rulers. A relative is the present mayor of Jerusalem.

Describing his Arab friend, Mr. White, says, "he is a man of unusual personal charm, is cultured and has advanced beyond his people in moral and aesthetic living. He is Orthodox Moslem, believing in a harem of four wives, as provided by Moslem law."

Sheik Iman hopes to obtain a "beautiful and competent" wife in America. As his chief wife, she will supervise his harem and household and will raise "many marketable daughters and hearty sons."

She will have the benefit of the traditional Arabian protective treatment of women but she can't be seen by those who are not members of her household, being required to wear a veil when outside.

Sheik Iman is by occupation an archaeologist and tourist contractor, Mr. White said. He is opposed to all intoxicants and tobacco because "he cannot afford to defile his body which to him is a divine instrument." He speaks correct English but with an Oriental accent, Mr. White said, having been educated in an American school near his home.

Besides Mr. Iman's occupation, he is greatly interested in astrology and geology.

And although Mr. White will not take the responsibility of selecting Sheik Iman's "Chief Wife," he will be glad to make contact with the Arabian for those interested. Mr. White can be reached by telephone at 9-1817 or by mail at Roebuck Springs.

Is there a Birmingham miss, "Beautiful and competent", who would like a life time job in foreign service? Sheik Fareed J. Iman, 29 years old Arabian aristocrat and archaeologist living in Jerusalem, is looking for just such young American woman to head his harem as "Chief Wife," he has notified his friend, Lytle White of Birmingham.

In its opinion, the court stated:

The very idea of a harem is repulsive to our American conception of morality and virtue. The purchase of a girl from her parents here in America, to be carried to some distant country, to complete an Arab's harem of four wives, is abhorrent to our American institutions and our conception of morality. And to falsely and maliciously publish to the world that one stood ready to aid and abet in the consumption of such a scheme is nothing short of a libel actionable *per se*.[157]

[157] 233 Ala. 547, 550, 172 So. 649 (1937).

§ 34. WORDS NOT ACTIONABLE

Published statements affecting negatively personal reputation not always regarded as defamatory.

Libel cannot be created out of thin air. There must be some substantial ridicule, obloquy, or contempt. In Press Co., Ltd. v. Stewart, a mildly humorous and sarcastic interview was published.[158] In the action started for libel the plaintiff claimed that the story exposed him to ridicule and was calculated to injure him in his business as a teacher. The trial court gave judgment to the plaintiff, but the case was reversed upon appeal. The court stated:

> At most it is a harmless bit of pleasantry in which the reporter has succeeded in making himself somewhat ridiculous. The matter has been very much magnified and an importance attached to it which it does not deserve. An actionable libel cannot be created out of nothing.[159]

Some newspaper articles which apparently might be libelous *per se* so as to injure one's social standing in a community have been held *contra*. The defendant in his newspaper printed an article concerning one W. B. Fey, who had become offended at the buying of paddles on a novelty doll at the county fair. Fey appeared before Des Moines state officials and protested against the Lyon county fair being allowed $750. The article stated that Fey would be regarded as a crank and would receive scant attention; further it noted that Rock Rapids citizens were incensed at his actions and that they would regard him as an interloper and question his motives, and continued:

> Regardless of his personal dislikes it would seem that his efforts to cripple a county's fair deserve condemnation.
>
> No loyal citizen of the county would be guilty of trying to cripple a public institution merely because some features or some of its management were objectionable to him.[160]

The court held that the criticism was not libel *per se*, for the article was predicated upon what the plaintiff had a legal right to do.

It is not libelous to charge a man with an act which he may do lawfully and which does not violate the moral code.[161] It would

158 119 Pa. 584, 14 A. 51 (1888).

159 119 P. 584, 603, 14 A. 51 (1888).

160 Fey v. King, 194 Iowa 835, 836, 190 N.W. 519 (1922).

161 Holloway v. Scripps Pub. Co.,

not be a libel to say of a man that he would not contribute with his fellow merchants for watering Jefferson avenue,[162] or that a man to get rid of a claim in court set up for his defense the existing prohibitory law,[163] or that a man used the Statute of Limitations to avoid a just claim.[164]

To publish that a person who had done no legal wrong was illegally put in jail would not be libelous, according to the decision in Hughes v. New York Evening Post Co.[165]

Although an inference may be carried in a story which may cast suspicion upon an individual, there is not necessarily defamation. On the basis of the following story, an action for libel was instituted:

THRICE BURNED

The Daniels & Cornell Block Again Visited by Fire—Damage Largely by Water, and Estimated at $70,000, Covered by Insurance

At 10:15 o'clock last night R. A. Reid, of the printer's firm of J. A. & R. A. Reid, while working at his desk on the top floor of the tall Daniels & Cornell Building on Customhouse street, discovered smoke and flame issuing from the composing room in the rear of the office, and which was raging near the boiler. He immediately descended to the street, and notified Patrolman Hartwell, who sounded an alarm from box 146 on the pole located at Turk's Head. The fiery element completely invaded the entire fifth floor, which was all occupied by the Messrs. Reid, who claim complete loss from fire and water. They were insured for $55,000. The fire extended from this room to the roof, the northwest portion of which was destroyed. The fire is the third to have occurred in this building in the past thirteen years. It was completely destroyed in the great fire of September, 1877, and all but ruined on Sunday evening, February 19, 1888. Every fire in this building has started on the upper floor, and twice in Reid's printing establishment.

11 Ohio App. 226 (1919); Foot v. Pitt, 83 App.Div. 76, 82 N.Y.S. 464 (1903).

162 People v. Jerome, 1 Mich. 142 (1848).

163 Homer v. Engelhardt, 117 Mass. 539 (1875).

164 Bennett v. Williamson, 6 N.Y. Super.Ct. 60 (1850).

165 115 App.Div. 611, 100 N.Y.S. 982 (1906).

The demurrer to this action was sustained, and affirmed by the supreme court, which remitted the case to the trial court with directions to enter judgment for the defendant.[166] It was held that the article contained no defamatory language capable of meaning that the fire was of incendiary origin on the part of the plaintiff, and that the story in no way reflected upon his character.

Defamation of the dead is not actionable libel civilly.[167] Under the common law doctrine, one's reputation dies with the person, although at common law it was a misdemeanor to defame a deceased person and subjected such a defamer to fine and imprisonment, on the ground that the disgrace to one's family might lead to a breach of the peace. It was held that under a state statute, a defamation of George Washington, first president of the United States, was a criminal offense.[168]

Relatives of a deceased person concerning whom a defamation was published cannot recover for the libel to the dead person; but if the relatives are libeled they may recover in another action.[169] In Bradt v. New Nonpareil Co.,[170] it was held that a mother could not recover damages for a libel published concerning her adult son after his decease.

False publication of the death of a living person is not libelous *per se*. The *New York Times* carried the following notice:

> Died—Brooklyn: Cohen-Bealey, 133 St. Marks avenue, May 6, Zealey (correct).

Cohen by his guardian *ad litem* sued for defamation, and in the trial court won judgment, which was reversed by the appellate division of the supreme court; in its opinion the court stated:

> The item states that an event has come to pass which is looked for in the history of every man, is regarded as beyond his control, and therefore, does not permit the inference that the man has done any act or suffered any act which he could not have done or which he need not have suffered. Prematurity is the sole peculiarity.[171]

166 Reid v. Providence Journal Co., 20 R.I. 120, 37 A. 637 (1897).

167 3 Restatement of the Law of Torts #560.

168 State v. Haffer, 94 Wash. 136, 162 P. 45, L.R.A.1917C, 610, Ann.Cas. 1917E, 229 (1916).

169 Wellman v. Sun Printing & Pub. Ass'n, 66 Hun 331, 21 N.Y.S. 577, 50 N.Y.St.Rep. 254 (1892).

170 108 Iowa 449, 79 N.W. 122, 45 L.R.A. 681 (1899).

171 Cohen v. New York Times Co., 153 App.Div. 242, 246, 138 N.Y.S. 206 (1912).

In Lemmer v. The Tribune,[172] the court held that the publication of an incorrect story of the death of a living person was not actionable because "it is no dishonor to die."

In an early South Carolina case, the defendant furnished a newspaper with an obituary notice, signed by another person. The notice was false both in the statement of death and in giving the age of the plaintiff, who was facetiously stated to be in her ninety-fifth year. In this case, where the notice was intentionally placed, the court held that there was actionable libel, for the notice was apparently intended to impair her enjoyment of society and to bring her into contempt and ridicule.[173]

If the false story of the death of a person yet living purports to disclose such death under disgraceful circumstances, such a publication could be libelous *per se,* for example, to publish falsely a story of the death of a minister in a brothel under shameful conditions would be clearly libelous *per se.*[174] The false story of the death of a business man so as to affect adversely his business interests and credit, it is submitted, would be libelous *per se.*

Words written or printed in jest cannot justify injury to reputation. The court in Triggs v. Sun Printing & Publishing Assn.[175] stated:

> We are of the opinion that one assaulting the reputation or business of another in a public newspaper cannot justify it upon the ground that it was a mere jest, unless it is perfectly manifest from the language employed that it could in no respect be regarded as an attack upon the reputation or business of the person to whom it related.

In Corrigan v. Bobbs-Merrill Co.,[176] the court affirmed that "reputations may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest."

Words that carry considerable sting, words which on the surface may seem libelous in themselves, are often held nondefama-

[172] 50 Mont. 559, 148 P. 338 (1915).

[173] McBride v. Ellis, 9 Rich.Law 313 (S.C.1856).

[174] Quinn v. Sun Printing & Publishing Co., 55 Misc. 572, 105 N.Y.S. 1092 (1907); aff., 125 App.Div. 900, 109 N.Y.S. 1143 (1908).

[175] 179 N.Y. 144, 71 N.E. 739, 66 L.R.A. 612, 103 Am.St.Rep. 841 (1904).

[176] 228 N.Y. 58, 126 N.E. 260, 262, 10 A.L.R. 662 (1920); State v. Elder, 19 N.M. 393, 143 P. 482 (1914).

tory. In Gillan v. State Journal Printing Co.,[177] the suit for libel was based in part upon the following words:

> Gillan and Harvey * * * are said to have had their heads together. It is known that Gillan has repeatedly written high school teachers asking them to launch attacks upon the university.

The court held that the words showed no presumption of injury inasmuch as no special damage was proved in evidence, noting particularly the following principle: "When a publication conveys only a general imputation upon the plaintiff's character, which would be similarly injurious to any one of whom it might have been published, it is not actionable, unless applied by the publication itself to the profession or occupation of the plaintiff." [178] Words to be actionable on the ground that they injure one in his trade or profession must touch him in regard to his particular work or activity by which he earns his livelihood. In Gillan v. State Journal Printing Co., the suit was based on general damages only, without any showing of injury to the plaintiff in his profession as an educator.

Although a joke may be libelous, depending upon the circumstances, a mere humorous story about a person which does not hold him up to contempt or ridicule is not libelous *per se.* In Lamberti v. Sun Printing & Publishing Assn.[179] an action for libel was lost on demurrer on the ground that a story published in the *New York Sun* telling of a practical joke being played upon a janitor who thought that he was cursed by the Black Hand society would be readily understood by the reader to be a joke.

The *Seattle Post-Intelligencer* printed the following story about a city hospital physician:

> **BROKEN NECK KILLS CITY PRISONER**
> **INJURY DISCOVERED AFTER MAN SPENT DAY IN CELL**
>
> ---
>
> Charles Adolph Dettz, middle-aged machinist, who lay all day in a padded cell at the city jail with a broken neck before attendants discovered his condition to be serious, died yesterday at King County Hospital.

[177] 96 Wis. 460, 71 N.W. 892 (1897).

[178] 96 Wis. 460, 465, 71 N.W. 892 (1897).

[179] 111 App.Div. 437, 97 N.Y.S. 694 (1906).

Dettz was found in the street at Westlake Ave. N. and Prospect St. at 5:30 a. m. Thursday, the coroner's preliminary report showed. He was taken to police headquarters and examined by Dr. Sol Levinson of City Hospital, who said he talked and walked normally, and who diagnosed his case as plain drunkenness.

In the afternoon Dr. O. J. Blende, another City Hospital physician, examined Dettz and diagnosed his condition as "alcoholic paralysis" and ordered him removed to King County Hospital.

Dettz lived at 1526 Belmont Ave.

County Autopsy Surgeon Gale E. Wilson, after a post-mortem examination, said that Dettz' neck had been fractured several hours before he was taken to jail.

In its opinion the court stated:

To charge a professional man with negligence or unskillfulness in the management or treatment of an individual case, is no more than to impute to him the mistakes and errors incident to fallible human nature. The most eminent and skillful physician or surgeon may mistake the symptoms of a particular case without detracting from his general professional skill or learning. To say of him, therefore, that he was mistaken in that case would not be calculated to impair the confidence of the community in his general professional competency.

This rule does not apply, of course, to those cases in which the charge of gross misconduct is such as to imply the unfitness of a physician in his profession.[180]

A judgment for the plaintiff was reversed with instruction to dismiss the action.

§ 35. INTENT IMMATERIAL

Defamation arising from joke, accident, or mistake is actionable; if intent present, punitive liability arises.

Intent, except as a part of express malice, is immaterial in libel.[181] When the press issues a story, it accepts full responsibility for any error or mistake which results in injury to reputation. According to the opinion stated in Hatfield v. Gazette Printing

[180] Blende v. Hearst Publications, 200 Wash. 426, 93 P.2d 733, 124 A.L.R. 549 (1939).

[181] Walker v. Bee-News Pub. Co., 122 Neb. 511, 240 N.W. 579 (1932); Switzer v. Anthony, 71 Colo. 291, 206 P. 391 (1922); Taylor v. Hearst, 107 Cal. 262, 40 P. 392 (1895); Folwell v. Providence Journal Co., 19 R.I. 551, 37 A. 6 (1896); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662 (1920).

Co., "the law looks to the tendency and consequences of a publication, rather than to the intention of the publisher." [182] Intent is sometimes confused with malice, which is regarded as either malice in law or malice in fact. Malice in law is presumed upon proof of publication and indicates an absence of legal excuse. Malice in fact means actual intent to injure or a "bad feeling" toward the person defamed, or such reckless disregard of the rights of others that injury results. Malice in fact is actual malice, spite, or ill will, or such negligence in publishing a libelous statement that any reasonable man would know its damaging effect.

Malice functions as an important element in libel; its literal meaning is badness, coming from the Latin, *malitia*, and signifying a possible inherent quality of mind. Its popular meaning is ill will or hatred. In law, however, malice has a meaning which does not always parallel either its literal or popular meanings. Malice may be wholly constructive, or malice in law, as distinguished from actual malice or malice in fact. Malice in law is that malice which is presumed in a published defamation. Irrespective of intention to libel, ill will, or desire to injure either person or property, a defamatory article implies legal malice, which is an element necessary in the traditional definition of libel.

In Bromage v. Prosser it was stated:

> Malice in common acceptance means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. [183]

"Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice," declared the court in Clark v. Molyneux,[184] who continued, "here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind."

The court in Gott v. Pulsifer [185] stated:

> But, in order to constitute such malice, it is not necessary that there should be direct proof of an intention to injure the value of the property; such an intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them. Malice in ut-

[182] 103 Kan. 513, 515, 175 P. 382, 3 A.L.R. 1276 (1918).

[183] (1825) 4 B. & C. 247, 107 Eng. Rep. 1051, 1054.

[184] (1877) L.R. 3 Q.B. 237, 247.

[185] 122 Mass. 235, 239, 23 Am.Rep. 322 (1877).

> tering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights and the consequences that may result to him.

Legal malice in its narrowest sense is a fiction. A publication which defames character may not have been motivated by malice at all; it is sufficient that the publication is made and that it causes damage; in such a case the element is implied. Coleman v. MacLennan [186] states:

> It is said that malice is the gist of the action of libel. This is pure fiction. It is not true. The plaintiff makes a complete case when he shows the publication of matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. Frequently libels are published with the best of motives, or perhaps mistakenly or inadvertently but with an utter absence of malice. The plaintiff recovers just the same.

In a libelous statement there may be only the malice implied from the very fact of publication itself, with damage to the identified plaintiff. On the other hand, the malice may be actually existent, that is, there may be present in the act of publication a real spite, or ill will.

Good faith in the publisher of an alleged libelous article does not relieve him of legal responsibility. In Morse v. Times-Republican Co.,[187] the newspaper had published a reprint of an article in the *Boone News Republican,* and had added some comment of a "palliative" character. In holding the article libelous, the court said:

> Legal malice in the publisher of a libel is not inconsistent with honesty of purpose and good motive. * * * Whoever gives currency to libelous matter (not protected as being privileged) must be prepared to prove its truth, if he would avoid liability to the party injured. [188]

If an agent be in any way concerned in writing, printing, publishing, or selling a libel, he will be both civilly and criminally liable. This principle is based upon two accepted tenets of agency, *qui facit per alium facit per se,* or "he who does a thing through another does it himself," and in case of a subsequent approval, *omnis ratihabitio retrotrahitur et mandato priori aequiparatur,*

[186] 78 Kan. 711, 740, 98 P. 281, 20 L.R.A.,N.S., 361, 130 Am.St.Rep. 390 (1908).

[187] 124 Iowa 707, 100 N.W. 867 (1904).

[188] 124 Iowa 707, 720, 100 N.W. 867 (1904).

or "every subsequent ratification has a retrospective effect, and is equivalent to a prior command."

The two theories of responsibility, as shown respectively in World Pub. Co. v. Minahan[189] and Folwell v. Miller,[190] can be reconciled upon the ground that only those primarily responsible for the organization and administration of the publishing function and editorial direction are clearly liable. In one instance, a managing editor of a paper published by a corporation may be in full and direct charge of his department in which case it may be assumed that he accepts responsibility. In another instance, the managing editor might be merely the agent of the owner and might work under the direction of the publisher or president of the publication in which case the corporation publishing the paper and managing director would be the parties primarily responsible for defamatory statements in their newspaper. It would seem that the question of responsibility resolves itself into a question of fact on the organization and division of authority on any particular newspaper or periodical.

There are two exceptions to the general rule that intent is immaterial in libel. The first exception is generally tenable; the second is not well founded on the basis of long-established theory of legal liability.

The first exception is concerned with the liability of the innocent agent or disseminator of a libel; for example, the linotype operator who sets the libelous story in type, or the newsboy who sells papers is *prima facie* liable, but such a person is not liable if he is able to sustain the proof of his innocence. In Street v. Johnson,[191] which concerned the liability of vendors of newspapers for libelous statements, the court noted:

> The authorities are to the effect that the mere seller of newspapers is not liable for selling and delivering a newspaper containing a libel upon the plaintiff if he can prove upon the trial to the satisfaction of the jury that he did not know that the paper contained the libel, that his ignorance was not due to any negligence on his part, and that he did not know, and had no ground for supposing that the paper was likely to contain libelous matter.

The managing officer of the newspaper, as well as the owner, is generally held liable for defamatory statements, for the owner

189 70 Okl. 107, 173 P. 815, L.R.A. 1918F, 283 (1918).

190 145 F. 495, 497, 10 L.R.A.,N.S., 332, 7 Ann.Cas. 455 (C.C.A.N.Y.1906).

191 80 Wis. 455, 458, 50 N.W. 395, 14 L.R.A. 203, 27 Am.St.Rep. 42 (1891); Emmens v. Pottle (1885) 16 Q.B. 354, 55 L.J.Q.B. 51.

is responsible for the system on which the publication operates and the editor-in-chief or the managing editor for the direction and supervision of the editorial staff. In World Pub. Co. et al. v. Minahan,[192] the court held that the managing editor, who was also an officer of the corporation and who was actively in control of the administration and policy of the publication was equally liable with the owner of the paper for a defamatory story, even though he had no knowledge of the particular article.[193] In a leading case in the Federal courts the *contra* position was taken on the ground that the corporation was liable, not the editor-in-chief acting merely as an agent of the owner, who in the particular instance knew nothing about the libelous publication, and who was not on duty at the time the defamatory publication was made. The court said:

> He cannot be held liable without disregarding the settled rule of law by which no man is bound for the tortious act of another over whom he has not a master's power of control.[194]

The second exception is the doctrine, brought out in Layne v. Tribune Co.,[195] to the effect that a newspaper is not liable for libel if it accepts a story, not libelous on its face so far as the editor may ascertain when it is received from normally reliable sources such as the Associated Press. The *Tampa Tribune* published the following stories:

> Washington, June 30–(A.P.)—Justice Gordon of District of Columbia Supreme Court today sustained the demurrer of Representative Dennison, of Illinois, to an indictment for possession of whiskey, holding that charge was phrased in too general terms.
>
> The action virtually was equivalent to dismissal of the indictment.
>
> Dennison and his former secretary were indicted after prohibition agents had charged they found trunks containing liquor had been delivered to his office in the House office building.
>
> Washington, July 7–(Universal Service)—An appeal may be taken from Justice Peyton Gordon's decision sustaining a

[192] 70 Okl. 107, 173 P. 815, L.R.A. 1918F, 283 (1918).

[193] World Pub. Co. v. Minahan, 70 Okl. 107, 173 P. 815, L.R.A.1918F, 283 (1918); Danville Press Co. v. Harrison, 99 Ill.App. 244 (1901); Smith v. Utley, 92 Wis. 138, 65 N.W. 744, 35 L.R.A. 620 (1896).

[194] Folwell v. Miller, 145 F. 495, 497, 10 L.R.A.,N.S., 332, 7 Ann.Cas. 455 (C.C.A.N.Y.1906).

[195] 108 Fla. 177, 146 So. 234, 86 A. L.R. 466 (1933).

demurrer to the indictment of Rep. Edward E. Dennison, republican, of Illinois, charged with illegal possession of liquor, it was indicated today.

District Attorney Rover announced he will ask Solicitor General Thatcher to sanction an appeal to the District of Columbia court of appeals.

Judge Gordon dismissed the case on the ground that the indictment, eight lines in length, did not meet the constitutional requirements that a defendant be advised with particularity of the charge against him so that he may prepare a defense.

Dennison, a dry, was indicted last Nov. 19, after a trunk said to have contained liquor, was found in his office in the House office building. A "leaky" suit case consigned to his office was found at Union Station. John Layne, described as his secretary, was indicted with Dennison.

In holding that the *Tampa Tribune* was not liable the court said:

The modern daily newspaper is an institution of news dissemination that was unknown to the early common law. Hence the common law rules relating to ordinary newspaper publications of libelous words had reference only to those matters of which the newspaper publisher purported to stand sponsor for the truth of. In ancient times, as now, the press was an effective agency commonly employed to push forward those whom it elected to favor, and to do harm to those whom it had disapproved. For this reason the power of newspapers when they came into being, was justly feared, and strict rules of law were promptly announced by the courts to redress and punish wrongs deemed to have been maliciously committed by them, through the publication of false and defamatory statements affecting persons in their reputations, professions, or businesses. None of these strict rules, however, was intended to take into account or to have any bearing upon present day phases of news dissemination, represented by the ordinary news columns of a modern newspaper.

Freedom of the press has long been a stated constitutional guaranty, yet it has always been held from an early date, that the constitutional guaranty of "freedom of the press" did not secure to libelers immunity from civil or criminal persecution, but was simply intended to secure to the conductors of the press the same rights and immunities, and such rights and immunities only, as were enjoyed by the public at large. That such conception of the law of libel should still be applied to original compositions and published statements of which newspaper publishers made themselves the responsible originators or authors, is not to be denied.

But with purely news items, simply reproduced from apparently reliable sources of information, without carelessness

> or recklessness in their publication, and without any showing of malice or intent to do harm to the individual written about, where no special damage is alleged or shown, the legal situation is different. No newspaper could afford to warrant the absolute authenticity of every item of its news, nor assume in advance the burden of specially verifying every item of news reported to it by established news gathering agencies, and continue to discharge with efficiency and promptness the demands of modern necessity for prompt publication, if publication is to be had at all. * * *
>
> In reprinting in its news columns matters of reported news items broadcast by such established news agencies as the Associated Press, Universal News Service, and the like, a newspaper is simply acting as a local "screen" from which is reflected, without any authorship of its own, dispatches composed and sent out by others. * * * And taking judicial notice of the practice, the courts must apply to the new condition which the practice has brought about, a rule of reason with respect to legal presumptions that would otherwise flow from the publication of libelous matters such as occasionally creep into the best regulated agencies for collecting and disseminating the news.
>
> We hold, therefore, that a declaration for libel predicated upon the alleged publication of a false news dispatch as to which neither the publisher, nor his agents, may be regarded as the author, must show either wantonness, recklessness, or carelessness in its publication, or be counted upon as a libel *per quod,* in order to set up a good cause of action.[196]

When a name of a person is misused, such misuse might be libelous *per se* if the person is naturally brought into hatred, contempt, or ridicule, or if social position or business is injured in connection with the libel on the person. The case of Washington Post Co. v. Kennedy[197] is in point. One Harry P. L. Kennedy was arrested in Detroit, Michigan, on a charge of forgery and was returned to Washington, D. C., where a proper memorandum of his arrest was made at police headquarters. The following day the *Washington Post* published the following:

[196] Layne v. Tribune Co., 108 Fla. 187–190, 146 So. 234, 86 A.L.R. 466 (1933).

[197] 3 F.2d 207, 55 App.D.C. 162, 41 A.L.R. 483 (1925). See annotations in 3 Wis.Law Review 419, 38 Harvard Law Review 1100.

ATTORNEY HELD AS FORGER

Harry Kennedy Brought Back from Detroit to Face Charge

Harry Kennedy, an attorney, 40 years old, was brought back to Washington from Detroit yesterday to face a charge of forgery.

According to Headquarters Detective Vermillion, who trailed Kennedy to Detroit, the man forged the name of a client for $900.00.

It appeared that Harry Kennedy, the plaintiff, was the only lawyer in the district by that name and that he was 37 years old. The question before the court was whether the omission of the initials of the person actually arrested was a legal basis for a suit for damages. The court held the answer in the affirmative. This case is *contra* to an earlier Massachusetts case, Hanson v. Globe Newspaper Co.,[198] in which it was held that the misuse of the initials of one Hanson did not constitute libel of and concerning the plaintiff; Justice Holmes, later Associate Justice of the United States Supreme Court, gave a minority opinion.

The *Albert Lea Tribune* published the following story:

On Tuesday night the sheriff's department arrested Gilbert Thorson of 314 Fourth street on a charge of having liquor in his possession for sale when he was caught with a supply of ten gallons. It was expected that a hearing was to be held sometime this afternoon but at the time of going to press the matter had not been heard.

The court held that the publication constituted libel,[199] despite the fact that shortly after the printing of the story an apology was made personally and a correction was run in the next edition of the newspaper.

Walker v. Bee-News Pub. Co.[200] illustrates a situation in which the misuse of a name was held not to be libelous. The *Bee-News* had carried a story about a wrestling match in Tom Walk-

[198] 159 Mass. 293, 34 N.E. 462, 20 L.R.A. 856 (1893).

[199] Thorson v. Albert Lea Pub. Co., 190 Minn. 200, 251 N.W. 177, 90 A.L.R. 1169 (1933); Hulbert v. New Nonpareil Co., 111 Iowa 490, 82 N.W. 928 (1900).

[200] 122 Neb. 511, 240 N.W. 579 (1932).

er's barn. The truth was that the match for which no license was obtained was held in D. H. Walker's barn a few miles from the Tom Walker farm. On the ground that the offense was not a crime involving moral turpitude the court held that the publication was not libelous.

§ 36. EFFECT OF HEADLINES

Defamation in a caption or headline, whether alone or in connection with an article, is actionable.

Headlines, though written by a person other than the reporter who prepared the story, are regarded in law as an integral part of the story. If the headline is libelous, even though the story itself is not libelous, the headline and the story would be considered as a unit and accordingly the result as published would be the subject of an action for damages. In Landon v. Watkins,[201] the court said:

> The headlines are an important part of the publication, and cannot be disregarded, for they often render a publication libelous on its face which without them might not necessarily be so.

The effect of the sting in a headline, although the accompanying story be free from defamation is well illustrated in Shubert v. Variety, Inc.[202] Variety carried the following headline and story:

> **SHUBERTS GOUGE $1,000 FROM KLEIN BROTHERS**
>
> **Force Vaudeville Act to Buy Release—Klein and Imhoff Opening for Orpheum**
>
> Two former Shubert acts were routed by the Orpheum circuit this week with Roger Imhoff and the Klein Bros. Both will open at the Palace, Chicago, next Sunday, with the rest of the Orpheum circuit to follow. The Klein Bros. were to have played the last half of this week at Loew's Greeley Square, New York. J. H. Lubin, Loew's booking chief, let them out of the bill to make the Orpheum opening. The Kleins had to pay $1,000 for a release from a Shubert production contract this week before they could accept the Orpheum route.

[201] 61 Minn. 137, 142, 63 N.W. 615 (1895).

[202] 128 Misc. 428, 219 N.Y.S. 233 (1926).

The defendant argued that despite the fact that "gouge" might be defamatory, the publication as a whole explained the meaning of the word and that it was merely intended to show that the plaintiffs *forced* Klein Bros. to pay $1,000 in order to be released from their contract.

It was pointed out by the court in its opinion that the sting of the article was in the headline and that many readers may not have read the entire article. For those who read the headline only, the impression clearly was that the defendants conveyed the meaning that the plaintiffs cheated, defrauded, or overreached in a bargain. The defendant moved for judgment on the pleadings on the ground that the complaint failed to give sufficient facts to constitute a cause of action. The court denied the motion, saying in part:

> The charge that plaintiffs had forced Klein Bros. to pay $1,000 to be released accused them at least of mean and hard dealing, and was indeed calculated to injure and prejudice *them in their business, and the article is therefore libelous per se.* This being the situation, no innuendo is necessary.[203]

Newspapers that feature headline presentation for the purpose of sensationalizing or selling copies may give edge or verve to the story, possibly going so far as to overemphasize the facts. In Jerald v. Houston,[204] the court pointed out:

> It is the practice of some newspapers deliberately to put poison in a headline and follow it with a weak antidote. This is done for the consumption of those who do not look below the headlines, and the expedient may go far enough to make a headline libelous notwithstanding what follows.

To determine whether a newspaper story with its headline and accompanying photographs is such that its natural and proximate consequence would cause damage to reputation, the entire presentation must be considered. Ordinarily in a news story, the headline is in no way a comment on the facts of the story; it is merely a summation in very condensed form.

In an editorial, giving the opinion of a newspaper on a current question of interest, the headline might be either a summation or an additional comment. In a feature article, the headline might well be an impressionistic, rhetorical label, or statement, different from any exact words used in the article itself; on the contrary, the headline might be in effect a compact, condensed

[203] Ibid., 128 Misc. 428, 219 N.Y.S. 239 (1926).

[204] 124 Kan. 657, 667, 261 P. 851 (1927).

statement of what follows. An example of this latter style appeared in the *American Medical Association Journal* under the authorship of Dr. Morris Fishbein. The headline was:

JOHN R. BRINKLEY—QUACK

The article followed, concluding with the sentence:

> From what has been written it is obvious that John R. Brinkley is a blatant quack of unsavory professional antecedents.

Dr. Brinkley sued Dr. Fishbein for libel. On the defendant's motion for judgment on the pleadings, the court, denying the motion, held the article and its headline capable of defamatory meaning.[205]

Headlines in connection with photographs or underlines explaining photographs are distinctly a unit of the news presentation; if a headline or underline, accompanying a photograph and a story, is correct, but the photograph is that of a person different from the one whose name is mentioned in both or either headline or story, there is a basis for a suit in libel.

The careless writing of a headline may result in liability for damages, as may be illustrated by the following headline and story:

HOTEL PROPRIETORS EMBARRASSED

> A judgment was entered yesterday by the Third National Bank against J. F. and W. H. Hayes of the St. George's Hotel, on a promissory note dated August 6th, and payable on demand for $1,500.

The plaintiff brought suit,[206] making the innuendo, "thereby then and there meaning the said J. F. Hayes, the said plaintiff, was in bad circumstances, insolvent, and unworthy of credit."

The newspaper had a right common to anyone to publish the court record to the effect that there had been a judgment entered against Hayes for $1,500, but as was pointed out by the court:

> It was neither the right or privilege of defendant or anyone else to publish in connection therewith the declaration, in the form of a headline, or otherwise, that the defendants in the judgment were embarrassed. That had a direct tendency to impair their credit and injure their business.[207]

[205] Brinkley v. Fishbein, 134 Kan. 833, 8 P.2d 318 (1932).

[206] Hayes v. Press Co., 127 Pa. 642, 18 A. 331, 5 L.R.A. 643, 14 Am.St.Rep. 874 (1889).

[207] 127 Pa. 642, 649, 18 A. 331, 5 L. R.A. 643, 14 Am.St.Rep. 874 (1889).

It has been held in fact that even though fair and true reports of any judicial, legislative, or other public and official proceedings are privileged under statutory enactment, thus protecting a reporter, editor, publisher, or proprietor, such privilege does not protect the headline.[208]

The *Milwaukee Journal* published the following story:

WARRANT FOR PASTOR IN FUR THEFTS

Church Organ Cached Loot at Park Falls— Minister Avers Pelts Were Legally Caught, Offering to Produce the Trapper

By Special Correspondent of The Journal

Park Falls, Wis.—Theft(s) of fox and otter skins which had been concealed in the organ of the Park Falls Congregational Church has led to the issuance of a warrant charging the pastor, the Rev. B. F. Schoenfeld, with possession of illegal furs.

The warrant, issued by Police Justice M. D. Hinshaw here, is in possession of Conservation Warden Allen Hanson, Ladysmith, for service.

Claim Furs Legal

Mr. Schoenfeld said Thursday that the furs on which the charge was based were legally caught and that he could produce as a witness the man who trapped them.

The arrest of Ray Sugrue, part owner of a Ladysmith confectionery store, for breaking into a warehouse at Ladysmith, resulted in the confession that he had stolen the furs from the church organ. Sheriff E. Wilson of Rusk county informed Mr. Schoenfeld and also informed Warden Hanson.

Found in Organ

Sugrue told Warden Hanson and later repeated the major details in an affidavit on file with Justice Hinshaw—That he got permission to practice on the church organ and that on the afternoon of Sunday, Nov. 17th, he opened the organ to show the mechanism to two companions and discovered a quantity of furs which he estimated to be worth $2,000 or $3,000. He said in his affidavit that he took three fox skins then and re-

[208] Campbell v. New York Evening Post, 245 N.Y. 320, 157 N.E. 153, 52 A.L.R. 1432 (1927); but see Schoenfeld v. Journal Co., 204 Wis. 132, 235 N.W. 442 (1931), *infra*.

turned with four companions the next night to get some more. They found only two other hides left in the organ.

Warden Hanson, upon learning from Sugrue and the other four men that the otter skins were dry, obtained the warrant for Mr. Schoenfeld. The otter season did not open until November 15th and the warden's contention is that otter hides taken after the opening of the season could not be dry on Nov. 18th when the two skins were stolen from the organ.

Taken to Police Station

Sugrue's affidavit said that he was taken to the Park Falls city hall by Police Chief James McDonald and that Mr. Schoenfeld was there and told him that he would be arrested as a thief if he did not pay $110 for the hides and $120 more to cover "detective fees".

Mr. Schoenfeld said Thursday that the charges were false. He said that he had been buying fur for some time and that the organ had seemed a safe hiding place to prevent robbery. He said that he bought the otter hides Nov. 17th and knew that they had been taken after the opening of the season because one of them was skinned before his eyes. At the chief's office, he said, he merely asked for his furs or their value. He declared the affidavit was false if it said he asked "detective fees".

"Framed" Pastor Says

"I knew this was coming", said Mr. Schoenfeld. "A warden told me three weeks ago I was going to be framed. This is malicious slander. They framed me once before and I waived examination and paid $150 just to avoid publicity. I didn't plead guilty or not guilty, I just handed over the money."

The minister referred to his conviction in December, 1928, on a charge of illegal possession of furs brought by Warden I. W. Boomer of Oshkosh, Wis.

The court in giving its decision for the defendant held that the headline and story considered together did not defame the plaintiff, especially inasmuch as the plaintiff was not personally identified in the headline.

§ 37. LIABILITY IN ADVERTISEMENTS

Purchasers of space and publishers are liable for defamatory statements.

Both the publisher and the advertiser, as well as the advertising agency, are liable for a libelous statement or picture that appears in an advertisement. The same general principles apply

to advertisements that apply in the presentation of news stories, criticisms, or editorials.

Inasmuch as some advertising comes to the publication from independent agencies, there may be a tendency for the publisher to be more lax in his supervision of copy than he would be in the case of news story copy. In fact, the problem of supervising advertising has become such an important one that at least one leading advertising agency has changed its policy in so far as carrying out its purposes are concerned. Formerly the agency's copy was designed to sell the goods or services of the clients, and to build good will for such clients. Now this agency has added another purpose, that is, to be legally certain so far as possible by advice of counsel, that all copy is within the law, or that it conforms to Federal Trade Commission rulings, Federal and state statutes concerning the honesty of advertising, and that it is free from libelous statements as well. In this agency in particular, an attorney was employed to act as a censor for copy despite the facts that some of the writers and copy executives were men earning many thousands of dollars a year for their services.

How dangerous advertisements may be, can be illustrated by Morrison v. Smith,[209] which concerned the publication of the following advertisement in the defendant's magazine:

> Illustrated new book. Up-to-date. The experience of a giddy typewriter girl in New York. Typewritten. Good is no name for it. Sent in plain wrappers, postpaid, on receipt of 25¢ in silver or stamps.

The advertisement, consisting of the foregoing copy and a picture of a young woman, was held by the court to be libelous *per se;* the court held that the plaintiff's contention that the copy gave the impression of unchastity failed. The evidence showed that the plaintiff was an actress, a married woman, and that she had never been a typist. In granting a new trial, the court stated:

> It (the advertisement) exposed the plaintiff to contempt and to ridicule, if it did not imply disgraceful conduct. None of her friends and acquaintances could fail to understand that in the plaintiff's life there had been passages of such a nature that only a woman of unbalanced character and of foolish recklessness could have experienced, which made interesting reading, and which the advertiser could not print, but was publishing in typewritten form. This was an outrage upon the reputation of a respectable woman. * * * The use of her

[209] 177 N.Y. 366, 69 N.E. 725 (1904).

> portrait was wanton, and obviously inspired by the notion that it would attract purchasers of the mysterious publication. There is no hardship in compelling the defendants to defend against the plain charge that the advertisement is libelous *per se*.[210]

The use of the wrong picture in an advertisement gives the foundation for actionable libel, as was decided in Peck v. Tribune Co.[211] The use of false or unauthorized testimonials in advertisements may constitute libel, according to decisions in Pavesich v. New England Life Ins. Co.,[212] Foster Milburn Co. v. Chinn,[213] and Hart v. John H. Woodbury Dermatological Institute.[214]

Though the headline alone may be libelous and the accompanying story free from defamation, there are occasions where the meaning of the headline may be in question. Central Arizona Light & Power Co. v. Akers [215] illustrates a case of this character. In that case, the plaintiff sued the publisher of the *Arizona Republic* and the *Phoenix Gazette,* the Central Arizona Light & Power Co., and others for an advertisement, headed, "Anti-Utility Racket." On motion of the plaintiff before the trial, all the defendants except the utility company were dismissed; for practical purposes, the case is interesting to newspaper publishers for it illustrates the liability of the newspaper for defamatory headlines and text in advertisements.

The higher court pointed out that the advertisement as a whole was libelous *per se,* but upon the basis of errors committed in the trial court, the judgment was reversed. The higher court believed that too much emphasis was given in the trial court's instruction on the word, "racket." The lower court had stated: "You are instructed, gentlemen of the jury, that the use of the word, 'racket' in the title of said advertisement construed in connection with the advertisement itself, is actionable *per se.*" The position taken by the higher court was to the effect that the placing of so much emphasis on the word "racket" had the effect of impressing the jury that the defendant had imputed a serious crime or criminal motive to the plaintiff. It was held that words that need an innuendo are not libelous per se, and that the word

[210] 177 N.Y. 306, 370, 69 N.E. 725 (1904).

[211] 214 U.S. 185, 29 S.Ct. 554, 53 L. Ed. 960, 16 Ann.Cas. 1075 (1909).

[212] 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am.St.Rep. 104 (1905).

[213] 134 Ky. 424, 120 S.W. 364, 34 L.R.A.,N.S., 1137, 135 Am.St.Rep. 417 (1909).

[214] 113 App.Div. 281, 98 N.Y.S. 1000 (1906).

[215] 45 Ariz. 526, 46 P.2d 126 (1935).

"racket" has no definite meaning. To some this slang word means a trick or a fraudulent scheme. The word might mean the fortune-telling or alimony racket, but that on the contrary it might mean the football, the baseball, or the prize fight racket, without any opprobrious meaning whatsoever.

§ 38. PICTURED LIBEL

Damage to reputation may result from publication of photographs or caricatures.

Pictures, cartoons, and caricatures are capable of being libelous. The publication of a wrong picture in connection with a defamatory story bringing the innocent party into contempt and ridicule is libelous. In Farrington v. Star Co.,[216] the plaintiff's picture was used in connection with a seduction story concerning a person of similar name; it was held that the plaintiff had been damaged. Newby v. Times-Mirror Co.[217] represents a leading type of case in which a newspaper article and a cartoon were published; it was charged that the cartoon imputed hypocrisy and habitual alteration of records by the plaintiff, an attorney-at-law. The judgment of the trial court for the plaintiff was affirmed. In Snively v. Record Pub. Co.,[218] action was brought for injury to a police chief of whom a cartoon was published depicting the chief holding a halo over his head with one hand and his other hand extending back to receive money tied to the end of a stick. In the trial court the plaintiff recovered but upon appeal the case was reversed on technical or procedural grounds.

As pointed out in the section on intent, the use of the wrong name will not relieve the defendant from liability when a libelous statement is published.[219] In Ball v. Evening American Pub. Co.,[220] a correct story was used, but with the story a wrong picture was used and so closely related to the story that the reader could easily conclude that the picture of the individual was the self-same person mentioned in the story. The plaintiff, Ball, won in the trial court, and the decision was affirmed by the appellate court, al-

[216] 244 N.Y. 585, 155 N.E. 906 (1927); De Sando v. New York Herald Co., 88 App.Div. 492, 85 N.Y.S. 111, 14 N.Y.Ann.Cas. 215 (1903).

[217] 46 Cal.App. 110, 188 P. 1008 (1920).

[218] 185 Cal. 565, 198 P. 1 (1921).

[219] Finnegan v. Detroit Free Press Co., 78 Mich. 659, 44 N.W. 585 (1889).

[220] 237 Ill. 592, 86 N.E. 1097 (1908).

though the Illinois Supreme Court reversed the decision and awarded a new trial.

The publication of a personal sketch and photograph together with a false letter of endorsement for a patent medicine is libelous *per se*.[221] A notable case of this character is Peck v. Tribune Co.,[222] in which it was shown that the defendant published a picture of the plaintiff over the name of Mrs. A. Schuman as part of a testimonial for Duffy's Pure Malt Whisky. This advertisement stated that she was a nurse who was a constant user of the product. The plaintiff lost the case in the trial court and in the circuit court of appeals but the Supreme Court of the United States reversed the decision on the ground that the publication of the plaintiff's picture in connection with an advertisement which was misleading so far as the plaintiff was concerned was libelous *per se*.

In Hart v. Woodbury Dermatological Institute,[223] an advertisement was used showing the plaintiff prior to and after treatments by the institute. With the photograph was a false letter of endorsement. The court held that the unauthorized use of the plaintiff's picture together with the false testimonial constituted libel. In an advertisement giving the impression that a book offered for sale was filled with inside information on the life of a giddy typist, and showing the picture of the plaintiff, the questionable character of the girl was implied.[224] Although the trial court ruled in favor of the defendant, the decision was reversed on appeal, and a new trial was granted.

In Pavesich v. New England Life Ins. Co.,[225] the plaintiff's picture without his consent was used with a statement about the benefits of life insurance. The court held that this was libelous as well as a violation of privacy.

The use of a cartoon, even though it may cause some irritation of personal feelings, is not necessarily libelous, as was decided in McNulty v. Press Pub. Co.,[226] in which a cartoon by H. T. Webster

[221] Foster Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364, 34 L.R.A., N.S., 1137, 135 Am.St.Rep. 417 (1909).

[222] 214 U.S. 185, 29 S.Ct. 554, 53 L.Ed. 960, 16 Ann.Cas. 1075 (1909).

[223] 113 App.Div. 281, 98 N.Y.S. 1000 (1906).

[224] Morrison v. Smith, 177 N.Y. 366, 69 N.E. 725 (1904).

[225] 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am.St.Rep. 104 (1905).

[226] 136 Misc. 833, 241 N.Y.S. 29 (1930); for other cases in which possibly embarrassing articles were held not libelous, see: Hughes v. New York Evening Post Co., 115 App.Div. 611, 100 N.Y.S. 982 (1906); Hughes v. New York Times Co., 119 App.Div. 896, 104 N.Y.S. 1130 (1907); and

depicted the plaintiff as "The Boy Who Made Good." The cartoon did violate privacy, the court held, for it was used for commercial purposes without the plaintiff's consent.

When the *Chicago American*[227] erroneously published the wrong picture in connection with the story of a suicide girl, the court held the paper for libel. The story said:

SUICIDE GIRL LAID TO REST

Evelyn Daly, Suicide
(Photo of Plaintiff)

(Caption) Evelyn Daly Succeeded in Taking Her Life After Twenty-five Attempts

Special to the American

Milwaukee, Aug. 17,—Evelyn Daly, daughter of Mrs. E. L. Daly, of East Lake, Mich., and who, under the name of Cecil Davis, of Cadillac, Mich., succeeded in ending her life after twenty-five attempts, was buried here today. Here are some of the attempts she has made within the last three months.

June 5—Took morphine; went to Emergency Hospital and asked to be pumped out.

July 5—Tried to fall on dagger, but only scratched her neck.

July 30—Jumped off open bridge, but found water too cold for comfort and yelled for help, which came in time to save her life.

August 14—Took carbolic acid and died at Emergency Hospital.

Miss Daly was known to the police as a suicide fiend. She would try to commit suicide at the least provocation.

She never tried hanging. She said she didn't like the illuminating gas method, and only tried that once. But carbolic acid, morphine, and laudanum were common poisons to her. She came here about five years ago and soon manifested her suicidal mania. Usually after taking poison she would call for the police patrol to take her to the hospital, or go herself and get the poison removed.

Sometimes she was too far gone to make her own call for help, but this was seldom.

Lamberti v. Sun Printing & Publishing Ass'n, 111 App.Div. 437, 97 N.Y.S. 694 (1906); Cohen v. New York Times, 153 App.Div. 242, 138 N.Y.S. 206 (1912).

[227] Wandt v. Hearst's Chicago American, 129 Wis. 419, 109 N.W. 70, 6 L.R.A.,N.S., 919, 116 Am.St.Rep. 959, 9 Ann.Cas. 864 (1906).

It was held that the insertion of the wrong picture under the headline was in effect a statement that it was the picture of the person to whom reference was made in the article, and that the article and picture, together with the accompanying headline constituted a libel as a matter of law, unless the fact that the article, noting that the suicide's name was Evelyn Daly, could be held to soften the otherwise libelous effect. The fact that the plaintiff whose picture was incorrectly used as that of Evelyn Daly, named in both headline and story, may not have been damaged in the estimation of the friends who knew her well, served only to lessen the injury and mitigate the damages.

In Hillman v. Star Pub. Co.,[228] the picture of a minor daughter of a man accused of fraud was used in connection with a story about warrants for Hillman and three of his associates. The daughter through her guardian sued for violation of privacy. The trial court dismissed the action and this judgment was affirmed by the Washington Supreme Court. It was held that there was no such a violation of privacy that relief could be given in that state, and further that publication of the picture did not expose the child to contempt or ridicule. Rather the picture, a part of a family group picture, would excite pity for the child. It is submitted that the use of such a picture of an innocent person in connection with a criminal investigation was poor journalistic practice.

§ 39. RADIO DEFAMATION

Broadcasting over the air presents new problems in defamation.

The question of defamation on the radio presents unique problems. It was once thought that slanderous words spoken were not as detrimental as defamatory words in a more permanent form such as in writing or print; on the other hand, in this modern day, words spoken over the radio have the same widespread effect in tendency at least as words scattered to the four winds through the medium of the press. It would seem that words spoken over the radio would be slander; however, it was held in the precedent-making case of Sorensen v. Wood,[229] that words written and then published over the radio would be libel rather than slander. It would seem that this decision is entirely logical,

[228] 64 Wash. 691, 117 P. 594, 35 L. R.A.,N.S., 595 (1911).

[229] 123 Neb. 348, 243 N.W. 82, 82 A. L.R. 1098 (1932); see especially notation 82 A.L.R. 1109.

for the effect of defamatory words over the radio is broad, and moreover there is usually a written record or prepared copy both for the reading of the broadcast and for the purpose of a record, according to the practices of the broadcasting companies.

Early recognition of the problem of defamation by radio was given by several state legislatures; the results have been confusing. For example, it was enacted by both Oregon [230] and Washington [231] that defamation over the radio is libel; on the contrary the states of California,[232] Illinois,[233] and North Dakota [234] have enacted statutes specifying that defamation by radio is slander.

The courts in their study of actions before them relating to this subject have been uncertain. In Singler v. Journal Co.,[235] the court noted the difficulties in deciding whether radio defamation is libel or slander, citing some of the early cases on this question.

In Miles v. Louis Wasmer, Inc.,[236] the court held that whether defamation over the radio is libel or slander is immaterial, stating "there is a close analogy between words spoken over a broadcasting station and libelous words contained in a paid advertisement in a newspaper." It would seem that the inclination is to regard such defamation as libel, for in Coffey v. Midland Broadcasting Co.,[237] the court said:

> The latter (newspaper publisher) prints the libel on paper and broadcasts it to the reading world. The owner of the radio station "prints" the libel on a different medium just as widely or even more widely "read." * * * The owner of a broadcasting station knows that some time someone may misuse his station to libel another. He takes that risk.

The broadcasting of information over the radio may be classed as one form of conduct, as has been so well pointed out by Prof. Lawrence Vold.[238] The fact that one speaks over the radio microphone is not necessarily indicative that any sound is sent over the ether waves; many activities must coordinate so that the

[230] Laws 1931, c. 366, p. 681.

[231] Laws 1935, c. 117, p. 329.

[232] Statutes 1929, c. 682, p. 1174.

[233] Smith-Hurd Revised Statutes c. 126 §§ 4–6.

[234] Laws 1929, c. 117.

[235] 218 Wis. 263, 260 N.W. 431 (1935).

[236] 172 Wash. 466, 472, 20 P.2d 847 (1933).

[237] 8 F.Supp. 889, 890 (D.C.Mo. 1934).

[238] The basis for liability for defamation by radio, 19 Minnesota Law Review 611, especially 639–644.

ether waves are sent from the transmitting station; atmospheric conditions may be such that there will be no reception on the part of owners of radio receiving sets notwithstanding the fact that the proper wave length is set for the particular broadcasting station. The engineers must regulate the transmission of the sound and, if executives who are checking the broadcast disapprove, the speaker might be cut off the air. All this activity implies that the broadcast of a speech or playlet or skit is the result of different scientific and social elements; the whole procedure may then well be classed as conduct.

Originally slander had a limited effect, but the introduction of the printing press brought new and greater means of spreading all kinds of information, including defamatory statements. The law of libel early presumed malice, while in slander cases, except in cases regarded as slanderous *per se,* malice had to be proved; libel was early regarded as a greater offense. In these modern times the radio has evolved the possibility of even greater dissemination of a defamatory statement than would be possible in the combined circulation of dozens of average sized newspapers. Defamation over the radio might easily be more damaging than the publication of defamation by means of typed impressions not widely distributed. Radio defamation has the same element of wide effect that obtains in defamation by the printed word, and so there should be, it is submitted, the application of the more stringent rules of libel rather than the antiquated rules set up for slander at common law.

In the Sorensen v. Wood case, it was pointed out that privilege is not conferred upon the broadcasting companies by the Federal Radio Act to publish defamatory information. This Act which prohibits the censorship by radio stations means only that the licensee is prohibited from censoring words as to their political or party trend; the station is not given any privilege to assist in the publication of a libel; it is not granted any immunity from the effect of such broadcasting of defamatory words by those who make use of the station's facilities.[239]

What might be a precedent-making decision in radio defamation is Summit Hotel Co. v. National Broadcasting Co.,[240] which recognized that radio presents a problem different from that which obtains with the newspaper. The newspaper is at common law absolutely liable for published defamatory statements unless

[239] 123 Neb. 348, 243 N.W. 82, 82 A. L.R. 1098 (1932).

[240] 336 Pa. 182, 8 A.2d 302, 124 A. L.R. 968 (1939).

it succeeds in a defense of justification, qualified privilege, or fair comment; however, the radio station does not have the opportunity to inspect all material before such material is broadcast; this is particularly true with interjected "ad lib" statements in regular broadcasts or in programs such as unrehearsed interviews on the street, at public occasions, and in the studio.

How far the doctrines formulated in this case will be accepted by the various jurisdictions remains a question. A condensed report of this case follows:

> The National Broadcasting Corporation rented its facilities to the J. Walter Thompson Company, a commercial advertising corporation for the transmission of a series of sponsored radio programs over one of its networks, comprising 26 stations. The series was sponsored by Shell Eastern Petroleum Products, Inc. The principal performer on the programs was Al Jolson, a comedian. All of the participants, including the announcer, were employed and paid directly by the advertising company. A script for each program was prepared in advance, submitted to the broadcaster, and followed exactly by the performers at rehearsals in the broadcasting studio, where it was approved. The script for June 15, 1935, called for an interview by Jolson with the winner of an annual golf championship. In broadcasting from defendant's studio in Radio City, New York, Jolson, when the program was one-half or two-thirds completed, suddenly interpolated an extemporaneous remark: In response to the golf champion's statement that he secured his first job at the Summit Hotel, Uniontown, Pennsylvania, Jolson said: "That's a rotten hotel."[241] The interjected remark was made without warning; it did not appear in the script, had not been made at rehearsal, and defendant did not know the words were to be used. Present in the studios were defendant's production director and the Thompson program director; neither had an opportunity to prevent the interjection.
>
> An action in trespass for defamation was brought to recover damages for injury to the hotel's reputation and business. No substantial attempt was made to show special damages, and the trial judge instructed the jury that the remarks were "slanderous *per se*." The lessor broadcasting company was held liable for damages in the sum of $15,000, as awarded by the jury. * * *
>
> The important question raised is whether a radio broadcasting company which leases its facilities is liable for an im-

[241] The exact statement was as follows: "But tell me, Sam, what did you do after you got out of college?" Answer: "I turned golf professional and in 1932 I got a job at the Summit Golf Club in Uniontown, Pennsylvania." Jolson replied: "That's a rotten hotel."

promptu defamatory statement, interjected "ab lib" into a radio broadcast by a person, hired by the lessees, and not in the employ of the broadcasting company, the words being carried to the radio listeners by its facilities.

When the radio sound reaches the human ear it is the spoken word. It is urged that the radio gives to it a power for harm even greater than the printing press gives to the printed word, but this conclusion does not consider the factor of permanency just mentioned, or the traditional belief in the veracity of the printed word, particularly important in the community where the injured person resides. Newspaper defamations possess possibilities for real harm far greater than defamations by radio, as they constitute permanent, continuing records, which, through circulation, are constantly republished. The radio word is quickly spoken and, generally, as quickly forgotten. Because of the differences in power of the stations from which it is sent, it may receive widely varying circulation. * * *

Radio broadcasting presents a new problem, so new that it may be said to be still in a state of development and experimentation. It was not conceived nor dreamed of when the law of libel and slander was being formulated. Publication by radio has physical aspects entirely different from those attending the publication of a libel or a slander as the law understands them. The danger of attempting to apply the fixed principles of law governing either libel or slander to this new medium of communication is obvious. But the law is not so firmly and rigidly cast that it is incapable of meeting a new wrong as the demands of progress and change require. * * *

In considering the basis of liability for defamation by radio and in balancing the conflicting interests, due regard must be had to the rights of all parties, and to the ultimate and collateral effects any pronouncement might have on public interests. A rule unalterably imposing liability without fault on the broadcasting company under any circumstances is manifestly unjust, unfair and contrary to every principle of morals. A fair aspect of the harm to the persons injured must be considered as well as the circumstances under which the incident occurred. An essential consideration in formulating a rule is the grave possibility of pyramiding damages as well as establishing criminal responsibility if defamatory broadcasting is treated as libel.

We therefore conclude that a broadcasting company that leases its time and facilities to another, whose agents carry on the program, is not liable for an interjected defamatory remark where it appears that it exercised due care in the selection of the lessee, and, having inspected and edited the script, had no reason to believe an extemporaneous defamatory remark would be made. Where the broadcasting station's em-

ploye or agent makes the defamatory remark, it is liable, unless the remarks are privileged and there is no malice.

We have assumed in our entire discussion that the remarks here made were actionable *per se*, and that if the station were liable therefor it would not be necessary to prove malice or special damages. Regardless of these considerations, since it is conceded that there was no possible way in which appellant could have anticipated or prevented the remark, appellee has no cause of action against the broadcasting company.[242]

The reasoning in the foregoing case is sound. Because of the inherent nature of radio, it would seem logical and legally acceptable in principle that there be a new classification in tort, to be called radio defamation.

[242] Ibid., 183–205.

CHAPTER 6

LIBEL TO PROPERTY

Sec.
40. Disparagement to Business Interests.
41. Necessary Allegations.
42. Advancing One's Own Interest.
43. Harmful Nondefamatory Statements.

§ 40. DISPARAGEMENT TO BUSINESS INTERESTS

Trade libel and slander of title distinguished from libel to personal reputation.

Disparagement of property possesses special interest to the press, because a newspaper or a trade journal, which in its advertising columns or in its news and editorial material reflects injuriously upon the property interests of another, might become equally liable for damages with the persons responsible for either the editorial article or the advertisement. A newspaper, for example, which carries an advertisement or an interview with a business man disparaging the property of another to his legal damage, would be regarded as a tort-feasor with the person or persons responsible for the insertion of such editorial or advertising material. The newspaper or the business magazine is liable directly, of course, for any disparagement of property when it does so on its own account.

Decisions of both English and American courts indicate that there are three classes of cases concerning goods or products, as follows:

1. Those in which the libelous words used in reference to the goods are libelous also in reference to the manufacturer or vendor especially imputing to him unfair business methods, dishonesty, or fraud.[1]

2. Those in which statements alleged libelous concern the quality of the goods themselves.[2]

[1] Burnet v. Wells, 12 Mod. 420 (1700).

[2] Evans v. Harlow, (1844) 5 Q.B. 624, 13 L.J.Q.B. 120; Western Counties Manure Co. v. Lawes Chemical Manure Co., (1874) L.R. 9 Ex. 218, 43 L.J.Ex. 171.

3. Those in which the statements charged amount to no more than assertions that one maker's products are superior to another producer's goods.[3]

Judicial discussion in reference to the foregoing classification may be found in the leading case of National Refining Co. v. Benzo Gas Motor Fuel Co.[4]

A disparagement of title or property, either real or personal, may be redressed through a civil suit for slander of title or for trade libel respectively. Technically, trade libel is not libel at all, for libel is an action to protect the right to reputation; trade libel is a trespass, actionable at common law by action on the case, or an action for indirect injury to property. Trade libel may be regarded also as a form of unfair trade practice which may be subject to both a civil suit for damages and equitable relief against further infringement; the rule is well established however that equity will not grant an injunction to prevent a libel. The situation is different in regard to trade libel, as a case might easily arise where there would be no full, complete, and adequate remedy at law.

Trade libel should not be confused with libel that is analogous to slander of a person in his trade or business. Trade libel is a libel against the business or the goods themselves,[5] either in title or quality; libel *per se* affecting one in his trade or business is for personal injury to one's ability or fitness for his particular work or calling. Libel *per se* injuring one in his trade or business ability is of course founded on the historical foundation of words slanderous *per se* affecting one in his trade, calling, or profession.

Trade libel is known as slander of title or slander of goods. Slander of title or slander of goods may be either spoken or written; the terms slander of title and slander of goods have come to mean all defamatory injury to things as distinguished from injury to personal reputation.

Disparagement of the quality of goods is tortious; such disparagement includes any false or deceptive statement of the quality of the goods of another.[6] Slander of title is a false and

[3] Hubbuck v. Wilkinson, (1899) 1 Q.B. 86, 68 L.J.Q.B. 34.

[4] 20 F.2d 763, 55 A.L.R. 406 (C.C.A. Mo.1927).

[5] Black & Yates v. Mahogany Ass'n, 34 F.Supp. 450 (D.C.Del.1940).

[6] Paramount Pictures v. Leader Press, 106 F.2d 229 (C.C.A.Okl.1939).

malicious statement disparaging to another's title to real or personal property.[7]

The *Inland Printer* published a criticism of engraving equipment distribution by a certain firm thus:

HALF-TONE HUMBUG

> Several inquiries have been received for an opinion regarding the "Fantastical" Half-Tone Supply Co. of Baltimore, Md. This concern offers for $25 a complete half-tone outfit, including material and instructions so that a boy of 15 can make half-tones at a cost much less than others can buy copper on which to engrave them. * * * In brief, this concern offers to sell for 50c half-tones which cost them, for material only three cents, and for which other photo-engravers charge $2.50. * * * Greater wealth than that of the Klondike would be theirs in time. * * * It should be hardly necessary to warn people against these concerns, but they are likely to do business while that saying of the experienced P. T. Barnum holds true, that "There is a fool born every minute."

The trial court found for the plaintiff, but the Illinois Appellate Court reversed the judgment on technical grounds, pointing out however the scope of the problem faced by a trade paper in commenting upon goods offered for sale, as follows:

> The publisher of a trade paper may doubtless make any fair and reasonable discussion of the wares of a merchant or manufacturer who solicits public patronage, and may publish an honest expression of opinion upon the merits of such wares. But, under the guise of expressing an opinion upon such wares, a publisher is not privileged to maliciously make any false statement of any material fact in relation to said wares; nor to maliciously make any false statement of fact which shall impute to such merchant or manufacturer a want of integrity in his business.[8]

The *Manitoba Free Press* used the following story:

A North End Ghost

> There is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants. His chief haunt is in a vacant house on St. John Avenue, near to Main. He appears late at night and performs strange antics, so that timid people give the place a wide berth. A number of men have lately made a stand against ghosts in general, and at night they rendezvous in the basement and close around the haunted

[7] Cawrse v. Signal Oil Co., 164 Or. 666, 103 P.2d 729, 129 A.L.R. 174 (1940).

[8] Inland Printer Co. v. Economical Half-Tone Supply Co., 99 Ill.App. 8, 16 (1901).

house to await his ghostship, but so far he still remains at large.

The higher court held for the plaintiff on the ground that the story was published with a reckless and indifferent regard for the rights of the owner of the property; the libel was against the property however, not against the reputation of the owner.[9]

In Western Counties Manure Co. v. Lawes Chemical Manure Co.,[10] the defendants not only gave an analysis of several manures as analyzed by the chemical laboratory at the University of Glasgow but added their own interpretation to the effect that the product made by the plaintiffs was inferior to their own manufacture, an assertion which was not true. The court held for the plaintiffs on the ground that the words disparaging the goods of the plaintiffs were without legal excuse or necessity, that they were false, and that they caused special damage.

Recovery for slander of property was obtained in Paull v. Halferty [11] because a sale of property containing an iron ore deposit was prevented through the defendant's assertion that the deposit was but a pocket which would soon play out. A sale of a mill property was prevented through the assertion of the defendants that a bank, rather than the plaintiff, owned the title to the property, according to the record in Bourn v. Beck; [12] the court held for the plaintiff on the ground of slander of title.

§ 41. NECESSARY ALLEGATIONS

Untruth, malice, and special damage are commonly accepted essentials to recovery for trade libel; difficulties of applying rules give rise to widely different decisions.

To recover in a suit for trade libel there must be five essentials established, as follows:

1. Publication or communication of the words charged.
2. Identification of the words as concerning the title or goods of the plaintiff.
3. Untruth of the statement.
4. Actual malice, or malice in fact, meaning either ill will or such an act or publication on the basis of which actual malice will be presumed.

[9] Manitoba Free Press Co. v. Nagy, 39 Can.Sup.Ct. 340, 341 (1907).

[10] (1874) L.R. 9 Ex. 218, 43 L.J.Ex. 171.

[11] 63 Pa. 46, 3 Am.Rep. 518 (1869).

[12] 116 Kan. 231, 226 P. 769 (1924).

5. Special damages to the plaintiff as a natural and proximate result of the publication of the words charged.

The necessary allegations in a suit for slander of title or trade libel are usually given as three, namely, falsity of the words communicated, malice, and special damage. In Houston Chronicle Pub. Co. v. Martin the court stated:

> To maintain an action for slander of property it must be shown that words were false, maliciously published, and special damage, proximately, naturally, and reasonably resulting to the owner of the property.[13]

The allegation of untruth or falsity is essential, for if the words communicated or published be true, there would be of course no basis for a defamation to the title or property of the plaintiff. Falsity of the alleged defamation forms the basis of the injury to the title or property in question.

To recover on trade libel or a slander of title, it is commonly accepted that actual malice be proved, that is, bad motive. This requirement is *contra* to what is termed malice in law, or "pleading" malice which is presumed in libel to personal reputation. Actual malice means in the first instance actual hatred, dislike, desire to injure, or positive ill will. This positive ill will must be against either the legal or equitable owner of the title or the goods, or the title or the goods themselves, in which case of course the legal result would be indirectly against the owner of such title or property.

Primarily, the actual malice or ill will must result in a material or pecuniary damage to the *res*, or the thing itself; however, from a practical point of view the hatred or actual malice, if existent, lessens the profit or advantage accruing to the owner of the title or goods; it is such as tends to cause a loss in fact or a lessening of the good will which the particular property might have in the public mind. So in effect the hatred or ill will would be against the owner's possibility of building up a profit or adding to the good will of the property in question.

As malice in law, a specified essential in libel to personal reputation, is a kind of shibboleth,[14] presumed upon proof of the publication of defamatory words, so actual malice as an essential in establishing a *prima facie* case in trade libel or slander of property requires some latitude in interpretation.

[13] 5 S.W.2d 170, 173 (Tex.Civ.App. 1928).

[14] Jeremiah Smith in 13 Columbia Law Review 13, at 25: "'Malice in law' is an utterly meaningless expression, a fiction, a nonentity."

Jeremiah Smith writing in the *Columbia Law Review* gives the following opinion:

> In an action for disparagement, when brought against a stranger, the existence of "malice in fact" is never an essential requisite to making out of a *prima facie* case. When it is said that "malice is essential but that malice will be presumed," this is merely repeating the old and absurd phraseology so often used in actions for defamation; the real meaning being that "malice" is not essential.[15]

In the celebrated case of Gott v. Pulsifer [16] in which a statue, "The Cardiff giant" was characterized as a fraud and a humbug, the court noted:

> To constitute malice (actual) it is not necessary that there should be direct proof of an intention to injure the value of property; such an intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them. Malice in uttering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights and of the consequences that may result to him.

The foregoing comments should not be taken to mean however that in either defamation to character or to goods or title, malice is not an important factor. The presence of actual ill will or hatred in personal defamation gives the foundation for punitive damages in addition to compensatory damages. The presence of actual ill will or desire to injure or such carelessness, indifference, and disregard for the effects of one's act upon the rights of another is clearly essential in trade libel or slander of title.[17] It is easier to prove actual ill will when the disparaging statement is made by a competitor against the goods or property of another rather than by a stranger, for there could be clearly a motive for the making of such a statement by a rival, a motive which might not be so easily distinguishable when the statement was made by a noncompetitor.

In Bourn v. Beck [18] the court in giving judgment for the plaintiff stated:

[15] Ibid., 24.

[16] 122 Mass. 235, 23 Am.Rep. 322, 325 (1877).

[17] Manitoba Free Press Co. v. Nagy, 39 Can.Sup.Ct. 340, 353 (1907). Judge Idington stated: "In the recklessness and indifference these facts display, I find furnished abundant evidence of malice and hence a legal remedy for such a palpable wrong."

[18] 116 Kan. 231, 226 P. 769, 770 (1924).

> If the defendants knowingly made false statements with the purpose of preventing the sale of the property for the purpose of gaining some financial advantage to themselves at the expense of the plaintiffs, their conduct was malicious in the sense here important, although they may have had no personal ill will toward them.

"If one were falsely and maliciously to represent that a piece of land and residence which a neighbor was about to sell, was very unhealthy, and thus break off an advantageous sale," according to the court's opinion in Paull v. Halferty,[19] an action would lie for slander of title when damage is shown.

An owner of a patent may notify infringers of his claim and give notice that he will bring suit to protect his legal rights if they do not desist such infringement. Such a notice is limited to what would be determined by reasonable men to be fair; actual malice will be inferred if the notice is false or opprobrious.[20]

Likewise, the owner of a trade-mark,[21] a copyright,[22] title to other personal property, or title to real property[23] may assert his claims when such claims are based on reasonable ground and belief but if such claims are false and are the natural and proximate cause of special damage legally established they may be used as evidence of actual malice.

To recover for slander of title or trade libel, it is imperative that special damage be established; in this regard trade libel differs from libel to reputation in that in a libel to reputation, through words actionable in themselves, the law presumes damage has been done.

Special damages must be the actual material or pecuniary damage incurred, whether these are shown in some specific losses, measurable in terms of money, losses capable of proof, or actual damages to a business as a going concern. It was stated in Erick Bowman Remedy Company v. Jensen Salsbery Laboratories[24] that special damages may be obtained for either the loss of individual customers or in exceptional cases for the loss of general business.

[19] 63 Pa. 46, 50, 3 Am.Rep. 518 (1869).

[20] Virtue v. Creamery Package Mfg. Co., 179 F. 115 (C.C.A.Minn.1910).

[21] McElwee v. Blackwell, 94 N.C. 261 (1886).

[22] John W. Lovell Co. v. Houghton, 116 N.Y. 520, 22 N.E. 1066, 6 L.R.A. 363 (1889).

[23] Bourn v. Beck, 116 Kan. 231, 226 P. 769 (1924).

[24] 17 F.2d 255, 52 A.L.R. 1187 (C.C.A.Minn.1926).

When the loss of a sale of property is claimed in a suit for disparagement, it is indispensable that the loss of the sale to a particular party be proved, for such loss is the substance of the action.[25]

The scope of special damages that may be shown was clearly indicated in the authoritative case of Pollard v. Lyon[26] as for example, "loss of marriage, loss of profitable employment, or of emoluments, profits or customers."

It is not a sufficient allegation of special damage to allege a serious loss of business or damaged credit.[27]

The position taken in Tobias v. Harland[28] held that the general allegation of loss of customers is not sufficient to enable the plaintiff to show a particular damage; in other words, it would be poor pleading to allege general loss of customers and then endeavor to prove the loss of particular customers. It is a fundamental rule that only that which has been specifically alleged can be proved at a trial.

Should it be impossible in a case to show the loss of particular business, or to specify accurately the exact amount of damage in detail, it would be possible for the plaintiff to bring in his books for the period prior to the alleged injury, thus to indicate his volume of business, the number of his customers although not the names or identity of particular customers, providing of course that the proximate cause between the defamatory publication and the damage incurred is proved.

It may be accepted as a general principle then that the loss of customers, general loss of business, the necessity to suspend business, and even prospective damages may be considered by the jury, when sufficient connection is shown between the alleged libel and the damage suffered.[29]

Actions for harmful statements to business or property often fail when they are not regarded as libelous *per se* to personal or corporate reputation or when no special damages are established in either an action for libel *per quod* or an action for slander of title or goods.

[25] Wilson v. Dubois, 35 Minn. 471, 29 N.W. 68, 59 Am.Rep. 335 (1886).

[26] 91 U.S. 225, 23 L.Ed. 308 (1875).

[27] Reporters' Ass'n v. Sun Printing & Publishing Ass'n, 186 N.Y. 437, 79 N.E. 710 (1906).

[28] 4 Wend. 537 (N.Y.1830).

[29] See 17 R.C.L. #198, and cases noted therein.

In Hartmann v. Sun Printing & Publishing Association,[30] suit was brought on the ground that the *New York Sun* published a story that a certain store had rotten and tainted meat in stock. It was held that the story was not libelous *per se* because it did not state that such meat was sold, and there was no allegation of special damage.

A hotel proprietor sued a newspaper because the newspaper published a story that a show troupe at the plaintiff's hotel had no money and so was refused board and that the troupe's baggage was detained. The court held that the hotel proprietor could not recover without some showing of special damage, because he acted within his legal rights in refusing service which could not apparently be paid for.[31]

The *New York Herald* carried a statement that the plaintiff's restaurant was favored by anarchists. It was held that the story was clearly a libel on his business rather than on his personal reputation and that as no special damages were proved his action failed.[32] In a similar case the proprietor of a concert hall at Coney Island sued for libel because such a picture entitled "In Kennedy's" was used as to impute that his place of business was a resort for improper characters; his action failed because the court held that the libel if any was on the concert hall or saloon and that no special damages were established.[33]

The well-reasoned case of Marlin Firearms Co. v. Shields[34] held the doctrine that equity will not interfere to enjoin a trade libel when it is impossible to measure special damages; the basis of the Marlin case is that libel of a manufactured article, in which there was no libel of the integrity, knowledge, skill, diligence, or credit of the maker, does not constitute libel *per se* unless the special damage be alleged and proved. In that case equity refused to interfere even though the plaintiff had no adequate remedy at law "because of the impossibility of ascertaining, identifying, or establishing, according to legal principles, any measure of damages."

The plaintiff corporation brought the action against Shields, the proprietor of the magazine, *Recreation,* to enjoin publication

[30] 74 App.Div. 282, 77 N.Y.S. 538 (1902).

[31] Zinserling v. Journal Co., 26 Misc. 591, 593, 57 N.Y.S. 905 (1899).

[32] Bosi v. New York Herald Co., 33 Misc. 622, 68 N.Y.S. 698 (1901); affirmed 58 App.Div. 619, 68 N.Y.S. 1134 (1901).

[33] Kennedy v. Press Pub. Co., 41 Hun 422 (1886).

[34] 171 N.Y. 384, 64 N.E. 163, 59 L. R.A. 310 (1902).

of any statement "in any form or under any guise, falsely attacking, misrepresenting, or depreciating plaintiff's said rifle, or its accuracy, effectiveness, merit, or value." *Recreation* had carried a criticism of the plaintiff's rifle, but the article did not charge the plaintiff with any deceit in vending or want of skill in manufacturing the gun. The Marlin company was not libeled in the ordinary sense, and no special damages were alleged.

In support of its opinion the court cited Tobias v. Harland,[35] as follows: "when words are spoken, not of the trader or manufacturer, but of the quality of the articles he makes or deals in, to render them actionable *per se,* they must import that the plaintiff is guilty of deceit or malpractise in making or vending them."

What may seem to be libel to property has been regarded by numerous courts as libel *per se* to the reputation of the merchant, manufacturer, or trader. To be defamatory *per se* the words must import that the merchant or manufacturer is guilty of deceit, fraud, or malpractice so as to injure his reputation in his calling, business, or profession. It has been held libelous *per se* to publish that a person sold impure ice cream which caused the death of a child,[36] to charge a railroad with incapacity or neglect so that belief in the charge on the part of the public would cause shoppers and passengers to refrain from employing the railroad as a common carrier,[37] to charge that the plaintiff sold adulterated butter, made up of 40 per cent butter and the balance grease, as creamery butter,[38] to charge that the makers of tamales sold rotten and poisonous food to the public.[39] In Steketee v. Kimm,[40] the court held that an article which depreciated a tradesman's wares and claimed that he counterfeited genuine labels, was libelous, and in American Book Co. v. Gates,[41] the court stated that a libel on a corporation's method of doing business was libel *per se.*

In certain instances it is difficult to distinguish a trade libel from ordinary libel, because the alleged libelous statement might

35 4 Wend. 537, 543 (N.Y.1830).

36 Larsen v. Brooklyn Daily Eagle, 165 App.Div. 4, 150 N.Y.S. 464 (1914); aff'd, 214 N.Y. 713, 108 N.E. 1098 (1915).

37 Ohio & Mississippi Ry. Co. v. Press Pub. Co., 48 F. 206 (C.C.N.Y. 1891).

38 Dabold v. Chronicle Pub. Co., 107 Wis. 357, 83 N.W. 639 (1900).

39 Craig v. Pueblo Press Pub. Co., 5 Colo.App. 208, 37 P. 945 (1894).

40 48 Mich. 322, 12 N.W. 177 (1882).

41 85 F. 729 (C.C.Iowa 1898).

be both against the maker of the goods and the goods themselves, in which case actions in both trade libel and libel would lie; one would be for the damage to the goods or the property, the other to the individual who owned the goods or property.

True, a libel on a man's goods would cause him a loss presumably and therefore pecuniary or material damage, but the point involved is whether the libel is on the goods or the property, or on the individual.

The case of the Cleveland Leader Printing Company v. Nethersole [42] illustrates the difficulty. The facts reported in the case show that the actress, Olga Nethersole, appeared in a series of plays in Cleveland, one of which plays was "The Labyrinth." The article concerning the play stated that the play, "The Labyrinth" was received frigidly in Cleveland and that the play was hissed when it was given in London. The article however did not refer directly to Miss Nethersole or state that she was disqualified for her profession, or that she was frigidly received when she gave the play in Cleveland; further it did not state that Miss Nethersole was hissed in London. As stated by the court, "the record shows that Miss Nethersole was not charged with any lack of character, or of womanliness as a woman."[43]

The decision given in the lower court for the plaintiff was reversed on the ground that the statements given did not affect the plaintiff (Miss Nethersole) directly but were a comment on the play itself, that is, against property.

Concerning the distinction between libel on the reputation of the person and libel on property, the court stated:

> The rule seems to be well established to the effect that while by the law of libel defamatory language is actionable without special damage when it contains a damaging imputation against one as an individual, or in respect to his office, profession, or trade, it is not actionable when it is merely in disparagement of one's property unless it occasions special damage.[44]

"A libel on a thing may constitute a libel on a person," noted the court in Kennedy v. Press Pub. Co.,[45] "Thus to say of a brewer that he adulterates his beer would be a libel on him in his trade, not because of the allegation that the beer was bad,

[42] 84 Ohio St. 118, 95 N.E. 735, Ann. Cas.1912B, 978 (1911).

[43] 84 Ohio St. 118, 128, 95 N.E. 735, Ann.Cas.1912B, 978.

[44] Ibid., 130, 95 N.E. 735, Ann.Cas. 1912B, 978.

[45] 41 Hun 422, 423 (N.Y.1886).

but because the language would import deceit and malpractice on the part of the brewer. It is, therefore, at times difficult to determine whether the publication attacks the person or merely the thing, and any apparent conflict in the authorities arises out of this difficulty. There is no dispute as to the principles, the difference is only as to the application of the rule."

A caterer sued for libel on the basis of the following story (in part):

> Probably never in the history of the ancient and honorable artillery company was a more unsatisfactory dinner served than that of Monday last. One would suppose from the elaborate bill of fare that a sumptuous dinner would be furnished by the caterer, Dooling, but instead a wretched dinner was served. * * * The cigars were simply vile, and the wines not much better.[46]

It was held by the court that words concerning the quality of goods, though false and malicious, would not constitute ground for libel without a showing of special damage. The decision was that in effect the statements made were against the dinner, the wines, and the cigars, rather than against the plaintiff's reputation. It is submitted that this decision in some jurisdictions especially if pleaded differently might have been considered a libel to the reputation of the caterer in respect to his ability in his trade or profession.

§ 42. ADVANCING ONE'S OWN INTEREST

Praise of a tradesman's wares or puffing of the qualities of a manufacturer is not defamatory unless there is a false statement of a rival's goods causing special damage.

It is entirely within one's legal rights to advance his own interests; one may praise his own goods, for example, with the result that sales of competitor's goods are lost, thereby causing pecuniary loss to the competitor; however, in such a case there would be no legal redress. It is not malicious in fact as to another if one praises his own wares; so-called puffing of goods is a commonly recognized practice though at times badly done. On the other hand, to disparage a competitor's goods may easily be malicious. As stated in Davis v. New England Ry. Pub. Co.:[47]

[46] Dooling v. Budget Pub. Co., 144 Mass. 258, 10 N.E. 809, 59 Am.Rep. 83 (1887).

[47] 203 Mass. 470, 479, 89 N.E. 565, 25 L.R.A.,N.S., 1024, 133 Am.St.Rep. 318 (1909).

> Their desire to advance their own interests, in competition, is not a justification for attempting to interfere with the plaintiff's business by misstatements, and the making of a false and misleading publication.

The bill in the foregoing case averred that the defendant publication was the only one of its kind issued or circulated in Boston, that it tended to create in the minds of the public the belief that it contained the names of all reputable local expresses doing business in Boston and vicinity and that the publication was usually and frequently consulted by those having occasion to employ a local express. The plaintiff, who carried on an express business, was omitted from the defendant's directory; it was alleged that the defendant controlled certain express business and sought a monopoly of that business to the exclusion of the plaintiff. The court in making its decision, noted that an intentional act of this kind, without excuse, constituted a violation of the legal rights of the plaintiff, holding that the injury was an injury to property, in words as follows:

> The injury is to property, and it is not technically a libel upon the plaintiff. The rule that a court of equity will not enjoin the mere commission of a crime does not apply. The conduct complained of works a continuing and permanent injury to the plaintiff's property. Upon proof of the facts set out in the bill, the plaintiff will be entitled to an injunction to protect him from the wrongful publication.[48]

In this case it will be noted that the wrongful publication consisted of an omission; it was not a positive act of libelous statement as to the plaintiff, as would be the more common case of a trade libel.

It was held in Johnson v. Hitchcock [49] that the plaintiff did not have an action when the defendant in the case had stated that his (defendant's) ferry was as good as that of his rival (plaintiff). A circular which in effect stated that the defendant's white zinc was equal to and, indeed, somewhat better than the plaintiff's was held not libelous; the court stated that for a person to puff his own goods and to claim their superiority over the goods of his rivals would not be actionable.[50]

Lord Denman in Evans v. Harlow [51] expressed well the difficulty if the courts recognized so-called puffing as being in effect a libel on a competitor's goods, when he stated:

[48] 203 Mass. 470, 479, 89 N.E. 565, 25 L.R.A.,N.S., 1024, 133 Am.St.Rep. 318.

[49] 15 Johns. 185 (N.Y.1818).

[50] Hubbuck v. Wilkinson, (1899) 1 Q.B. 86, 68 L.J.Q.B. 34.

[51] (1844) 5 Q.B. 624, 631, 13 L.J.Q.B. 120.

> The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose but wasted tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be "false, scandalous, malicious and defamatory" that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action.

The protection of one's own interest gives a right of privilege in so far as a tradesman or manufacturer endeavors to protect the reputation of his own goods. In Boynton v. Shaw Stocking Co.,[52] suit was brought for slander of goods on the basis of the following advertisement:

> **Caution**
>
> An opinion of Shaw knit hose should not be formed from the navy-blue stockings advertised as first quality by Messrs. S. W. Boynton & Co. at 12½ cents, since we sold that firm, at less than 10 cents a pair, some lots which were damaged in the dye-house. Shaw Stocking Company, Lowell, May 29, 1886.

The court held for the defendant on the ground that the purpose of the defendant's advertisement was to uphold and maintain the character of its own goods rather than to libel the character of the plaintiff. Relief was denied for similar reasons in John W. Lovell Co. v. Houghton,[53] because the defendant was acting only to protect what he thought was his copyright.

§ 43. HARMFUL NONDEFAMATORY STATEMENTS

Words published though not defamatory become actionable when they are malicious or fraudulent and cause special damage.

Publication of words not defamatory in themselves may become actionable when they are the natural and proximate cause of special damage. It was broadly stated in Hollenbeck v. Ristine[54] that all words are actionable if special damage results. Such words or statements, whether spoken or written, may be communicated with a malicious or fraudulent intent to injure a person or a business, without defaming such person or busi-

[52] 146 Mass. 219, 15 N.E. 507 (1888).

[53] 116 N.Y. 520, 22 N.E. 1066, 6 L.R.A. 363 (1889).

[54] 105 Iowa 488, 75 N.W. 355, 67 Am.St.Rep. 306 (1898).

ness in the usual derogatory sense.[55] If a priest, for example, exhorted his congregation not to patronize a certain physician because that physician had been married a second time contrary to the regulations of his church and because this marriage had been performed by a civil officer rather than by a pastor, the words would not injure the physician as to his medical or surgical ability but nevertheless the tendency would be to lessen the practice of the physician in his community. The words would not be false, yet they would inflict damage. In such a case the plaintiff recovered.[56]

In Martin v. The Picayune,[57] suit was brought for libel because of a story which praised a certain physician for his treatment of a difficult case; in the trial the plaintiff endeavored to show that reputable physicians did not advertise and that the story praising him in effect classified him with medical quacks who built up their practice through advertising. In its opinion reversing the trial court which had sustained exception to the plaintiff's complaint, the higher court held that the words were actionable whether they were defamatory or not.

To state falsely that a certain firm or company is no longer in business would tend to damage the business of such an enterprise. In Ratcliffe v. Evans [58] the plaintiff sued on the publication in the *County Herald,* a newspaper, that Ratcliffe & Sons were no longer in business, with the result that business volume fell off considerably. The plaintiff recovered damages. It is submitted that if such a case were tried on the basis of a libel *per quod* showing that the credit of the firm had been bad, for example, an action for defamation might succeed. In American Insurance Co. v. France [59] similar circumstances were shown, that is, to the effect that the company was no longer in business; however, the plaintiff failed because special damages were not proved. The court however characterized the law

[55] Ratcliffe v. Evans (1892) 2 Q.B. 524, 527—"That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law"; Benton v. Platt, 2 Wend. 385, 389, 20 Am.Dec. 623 (N.Y.1829)—"If a man wickedly assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, the law should compel him to pay for it."

[56] Morasse v. Brochu, 151 Mass. 567, 25 N.E. 74, 8 L.R.A. 524, 21 Am. St.Rep. 474 (1890).

[57] 115 La. 979, 40 So. 376, 4 L.R.A., N.S., 861 (1906).

[58] (1892) 2 Q.B. 524.

[59] 111 Ill.App. 382 (1903).

in such circumstances when special damages are established, saying:

> It is undoubtedly the law that, where there is an assertion on the part of the defendant of an unqualified falsehood, with a fraudulent design or intent, as to present or future fact, and a direct, positive and material injury to the plaintiff arises or results therefrom, it is sufficient foundation for an action on the case against said defendant.[60]

Damaging words not defamatory in their nature may be classed to include spoken or written words communicated for the purpose of fraud; such words are classified under actions for fraud or deceit. To establish fraud, it is necessary for the plaintiff to prove that the defendant made a false representation concerning a material fact with the intent that such representation be acted upon and that the plaintiff believing such representation true acted upon it to his damage.[61] In an early New York case the court noted the following:

> Fraud and deceit in the defendant and damage to the plaintiff are a sufficient foundation for an action of trespass on the case, though no benefit accrue to the defendant. The action will lie whenever there has been the assertion of a falsehood with a fraudulent design as to a fact, when a direct and positive injury arises from such assertion.[62]

If A advises B falsely that C may be trusted for a bill of goods for the purpose of inducing B to let him have the goods and B loses the value of the goods, A's words were a fraud upon B.[63]

Closely akin to fraud is the tort of malicious falsehood. In an early case A intending to marry a certain girl B whom C expected to marry, wrote to C saying, "You ought not to marry her, for before God she is my wife." The girl was damaged because of her lost marriage to C. B won a suit for damages against A because of A's false and malicious statement, although B was not defamed by A's statement.[64]

[60] Ibid., 385.

[61] Southern Development Co. v. Silva, 125 U.S. 247, 8 S.Ct. 881, 31 L.Ed. 678 (1888).

[62] White v. Merritt, 7 N.Y. 352, 356, 57 Am.Dec. 527 (1852).

[63] Pasley v. Freeman (1789), 3 Durn. & E. 51.

[64] Sheperd v. Wakeman (1662), 79, 82 Eng.Rep. 982.

CHAPTER 7

CRIMINAL RESPONSIBILITY

Sec.
44. Libel as a Crime.
45. Special Characteristics in Criminal Libel.
46. When the Federal Government Intervenes.
47. Obscene Publications.
48. Obscenity Not Privileged.
49. Blasphemous Publications.

§ 44. LIBEL AS A CRIME

Liability is broad on the theory that any libel tending to contentious acts and breaches of the peace contravenes public policy.

Defamation may be a crime, particularly written or printed defamation. Although slander is not punishable at common law [1] various state statutes make slander a misdemeanor, especially in so far as imputations of unchastity to an innocent woman, or false statements about the financial conditions of banks and other financial institutions are concerned. It has been held that these statutes making certain forms of slander a crime do not violate the constitutional guaranty of freedom of speech.[2] Words spoken are commonly subject to criminal penalty when they are obscene, blasphemous, or seditious. Spoken words may be subject to criminal penalty when they are an effective part of a conspiracy to slander.[3]

Several forms of disorderly conduct involving spoken words other than those mentioned in the foregoing are misdemeanors. A woman who by her habitual scolding disturbs the peace and comfort of a neighborhood has been held a common scold or public nuisance.[4] Spreading false rumors so as to cause alarm in a community has likewise been held a nuisance indictable at common law.[5]

[1] State v. Hewlin, 128 N.C. 571, 37 S.E. 952 (1901).

[2] Hyde v. State, 159 Wis. 651, 150 N.W. 965 (1915).

[3] Commonwealth v. Tibbets, 2 Mass. 536 (1807); People v. Dyer, 79 Mich. 480, 44 N.W. 937 (1890).

[4] Commonwealth v. Mohn, 52 Pa. 243, 91 Am.Dec. 153 (1866).

[5] Commonwealth v. Cassidy, 6 Phila. (Pa.) 82 (1865).

To slander a judge or to make statements which interfere with the administration of judicial or legislative authority may subject such slanderer to contempt of court. To disrespect an injunction against a boycott or unfair trade by making statements tending to encourage violations would of course be contemptuous.

Thus, although slander is not commonly regarded as a crime, there are various means, based either on common law or statute, to punish the maker of certain types of slanderous statements.

There are three special phases of criminal libel, seditious libel, obscene libel, and blasphemous libel. At common law in the several states there is no crime of seditious libel, although various statutes have been enacted covering sedition. Obscene and blasphemous libel are discussed in this chapter. For a discussion of sedition, reference may be made to Chapter 2.

Libel may be a crime subject to an indictment or criminal information as an offense against the state. A libelous statement subject to a civil suit for damages may be criminally prosecuted when the tendency of such an alleged libel is to cause a breach of the peace; in one aspect the injury is to public authority.

At common law libel is a misdemeanor.[6] The modern law of criminal libel had its beginning in the Star Chamber decision, De Libellis Famosis, in 1605;[7] this early case gave the basic scope of criminal libel as an offense against the administration of government and justice, as follows:

> If it be against a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breaches of the peace, and may be the cause of shedding of blood, and of inconvenience: if it be against a magistrate or other publick person, it is a greater offense; for it concerns not only the breach of peace, but also the scandal of government.

In criminal libel at common law there could not be a prosecution unless there was knowledge of the offense, for this crime, as in most serious crimes, embraces two distinct elements, the

[6] Noyes v. Thorpe, 73 N.H. 481, 62 A. 787 (1906).

[7] 5 Coke 125 (1605), 3 Coke's Reports (Fraser Ed., 1826) 254, part 5—125a.

act itself and the *mens rea,* or guilty mind.[8] The publication must be willful and must imply a guilty mind, or at least that the publication took place without any justification or reasonable excuse.

Criminal libel, an offense at common law, is a crime *malum in se,* or a crime in itself, as distinguished from a crime *malum prohibitum,* or one merely prohibited by the legislature but not otherwise wrong. The distinction between crime *malum in se* and crime *malum prohibitum* is not of great importance so far as criminal libel is concerned.

It is submitted that the courts look unfavorably upon prosecution for libel unless the words are unusually likely to arouse the wrath of the individual libeled. If the case seems to the prosecuting officers to warrant an information or an indictment for criminal libel, the action might be instituted; however, in the last analysis, the problem would be for the jury to determine whether the *particular* libel would be likely to induce a breach in public administration, public morals, or public religious ideals. The administration of criminal justice does not concern itself with trifling offenses, as a general policy, in keeping with a great principle of law, *lex non curat de minimis,* or "the law cares not about trifles."

Libel is regarded as a crime against society because of its tendency to cause a violation of law.[9] Criminal liability for a libelous statement is broad in theory, and under numerous state statutes, any libel, it would seem, may be subject to prosecution, for any libel *may* lead to contentious and quarrelsome acts and breaches of the peace.

As a matter of fact, not every libel which injures private reputation is regarded as a criminal libel; compensatory damages are usually regarded as sufficient. It is unlikely that the average libelous statement would tend to cause a breach of the peace. To be criminal libel actual malice must be alleged and proved, although of course actual malice may be interpreted as being such reckless disregard of the rights of others that the act itself may imply actual malice. If the enormity of the offense leads to provocation of wrath and reprisal so as to disturb the public peace, an indictment would lie. As it is impos-

[8] Clark, W. L. and Marshall, W. L., Crimes (3d Ed.) ##38–40, pp. 59, 60.

[9] De Libellis Famosis, 5 Coke 125 (1605), 3 Coke's Reports (Fraser Ed., 1826) 254, part 5—125a; State v. Avery, 7 Conn. 266, 18 Am.Dec. 105 (1828); Tucker v. State, 42 Okl. 204, 275 P. 382 (1929).

sible to measure the degree of self-restraint necessary for an individual to maintain orderly conduct when humiliated by a civil libel to his character, there is the possibility that any libel, either libel *per se* or libel *per quod,* could be subject to indictment. Ordinarily, a libel *per quod* is redressed sufficiently by a judgment for special damages.

Clearly any libel imputing a crime involving moral turpitude, imputing that a person is infected with leprosy, venereal disease, the plague, or insanity, asserting that an innocent woman is unchaste, or charging that a person is unfit for his office, business, or profession might subject the publisher of such libel to criminal action. In Kennerly v. Hennessy,[10] the court expressed itself cautiously, as follows:

> At common law a criminal prosecution for libel is warranted only when the alleged libel affects the public, as when it corrupts the public morals or incites to violations of the criminal law or when the necessary or natural effect of the alleged publication is to cause an injury to a person or persons of such a nature and extent as to render a breach of the peace imminent or probable.

As a general rule, the gist of criminal libel is the tendency of a malicious defamatory publication to cause a breach of the peace. In State v. Gardner,[11] the court stated for example:

> The gist of the crime is not the injury to the reputation of the person libeled but that the publication affects injuriously the peace and good order of society.

The truth of the libel, unless published for justifiable ends, does not absolve the offense. In an historic case, it was stated:

> If the doctrine be true that, the gist or essence of the offence of libel is, that it tends to provoke a breach of peace, * * * then it must follow, that when the publication complained of is of a libellous nature, it must be taken to be of a malicious character, unless the defendant shall within some of the known provisions of law be admitted to prove, and shall in fact prove, that the allegations made are true, and that he had some warrantable purpose, inconsistent with a malicious intent, in causing the publication.[12]

Criminal libel may be defined therefore under common law principles as a malicious publication in printing, writing, sign, or picture which brings an individual or a corporation into hatred,

[10] 68 Fla. 138, 139, 66 So. 729 (1914).

[11] 112 Conn. 121, 151 A. 349 (1930).

[12] Commonwealth v. Blanding, 20 Mass. 304, 311, 3 Pick. 304, 311, 15 Am.Dec. 214 (1825).

contempt, or ridicule, vilifies the memory of a deceased person, reviles the Deity, tends to corrupt the public morals, or tends to disrupt by force the established public order.

In a narrow sense, a criminal libel is one which tends to cause a breach of the peace, or to vilify the memory of a deceased person. This is the basis of statutes defining criminal libel; blasphemous libel and obscenity are separate classifications. Seditious libel is not a common law crime in the United States, but various state syndicalism acts and the Federal act on espionage may be used to punish sedition, particularly in attempts to overthrow established government or in time of war.

A majority of the states have broad statutes defining criminal libel, other than blasphemous, obscene, or seditious libel. In states where there are no general statutory definitions of libel, the courts may of course rely upon common law principles in punishing malicious defamation.

Several states have enacted statutes making it a misdemeanor to communicate knowingly defamatory information about any person or corporation to a newspaper with the intent that such information be published. Though these statutes vary slightly in expression, the purpose is parallel.

Statutory provision in a few states declares that making threats to defame another or offering to prevent a libel for valuable consideration constitutes a misdemeanor.

Libelous writings or writings threatening character on any envelope or wrapper may not be sent through the mails. Any one depositing such nonmailable matter for distribution is subject to a fine of not more than $5,000 or imprisonment of not more than five years, or both.[13]

A cartoon of Frank B. Noyes, an official of the Associated Press, depicting him as director of an organization that poisoned the news, brought the indictment of the publisher of the *Masses*.[14]

The defendant's demurrer to the indictment was overruled.

The publisher of the *Somerset News* (Maryland) was held on a $2,500 bond for a grand jury hearing on a charge of criminal libel. The publisher, Rives Matthews, stated in his weekly newspaper that J. Millard Tawes, state comptroller, had traveled 2,000 miles in a state-owned automobile to attend his son's

[13] P.L. & R., Sec. 599.

[14] People v. Eastman, 89 Misc. 596, 152 N.Y.S. 314, 33 N.Y.Cr.R. 80 (1915).

wedding and that he had accordingly violated the pleasure driving ban in eastern states. Following this publication, Tawes told the ration board that he had arranged his trip so that he could visit several state capitals on business. Tawes' statement was accepted by the local ration board. In a statement Matthews claimed that his arrest was political persecution and "an assault upon freedom of the press."[15]

In State v. Gardner,[16] the defendant was found guilty of criminal libel for the publication of the following:

> Chief William C. Hart, Officer Dolan, the finger print expert, Sergts. McCue, Feeney and McAvay, were in collusion with a bootlegging gang. Chief Hart is the owner of three autos; two new ones of the Auburn type were purchased this year at an approximate cost of $3500 for the two. I believe these were bought with bootleg money. Chief Hart and his wife are bootleggers. In fact the whole d—— family are. They meet bootleggers at the town line and escort them in and many times the illicit liquor is transferred to the Chief's car, or his wife's auto, and delivered to the consumer.

For the publication of the following the defendant was held guilty of criminal libel: [17]

> THIEVES FALL OUT
>
> The case against the Stafford county boodlers is now occupying the attention of Judge Martin's court at Hutchinson. Oliver, one of the accused, has turned state's evidence, and gave the whole robbery away. He testified on oath that he went to Frank Larabee and told him the courthouse was to be robbed, and if he had any money there to get it out at once. It was further developed in the evidence, that Larabee went to the treasurer, and drew a large sum of money a day or two before the robbery. We understand Larabee corroborates the above evidence, and admitted being posted as to the time the robbery would occur.

The Supreme Court of Montana affirmed the conviction for criminal libel on the basis of the following publication: [18]

[15] Editor and Publisher, June 12, 1943, p. 3.

[16] 112 Conn. 121, 151 A. 349 (1930).

[17] State v. Clyne, 53 Kan. 8, 35 P. 789 (1894).

[18] State v. Winterrowd, 77 Mont. 74, 249 P. 664 (1926).

BYRON AND BERT ARE PARDS

Gross Violation of Law; Will Co. Attorney Take Action?

There can no longer be a particle of doubt that Constable Bert Christie is still acting as stoolpigeon for Byron DeForest, also there is a grave suspicion that Judge Wilson's court is strangely biased whenever DeForest is concerned in a court issue.

It all works out something like this: Byron DeForest wishing to make an attachment on account calls in Bert, the constable, and instructs him to go and find out who is indebted to such and such a person, after obtaining this information he is further instructed to carry out the legal function of attachment, which Bert does unhesitatingly.

We have evidence to prove our assertions, and are prepared to give such information to the prosecuting attorney's office any time it wishes to use same to bring ouster proceedings against this notorious constable for malfeasance of office and an open and flagrant violation of the laws of the state of Montana. No longer ago than last week Bert Christie circulated the Town Topics' advertisers, inquiring of them whether or not they were indebted to Town Topics; those that admitted they were, he served a writ of attachment and in this manner tied up the account. Town Topics has since given bonds to cover the attachment of accounts and they have all been released.

The attachment proceedings instituted against Town Topics by Byron DeForest and Constable Christie involves an old claim of Stone the Clothier, contracted when Town Topics was the property of the Cascade Trades & Labor Assembly, an account which the present owner is not responsible for in the least degree. If there is anything due Stone, which we doubt very much, the present owners could not be held to account.

However, whatever the circumstances may be, Bert Christie is acting in an unlawful manner, not only in this instance, but in other cases previous to this. He has taken accounts personally for collection and then turned these accounts over to DeForest Collection Agency, thus forming a sort of collusive partnership between the Bad Bill Collector and the office of Constable Bert Christie.

Will the county attorney make a move to investigate the conduct of Constable Christie at this time? If he does his duty we don't see how he can get away from it and bring ouster proceedings against Christie. * * *.

As far as the account against Town Topics is concerned that does not amount to anything, the attachment was brought through spite work by Bert and Byron in revenge for the manner in which Town Topics has exposed their dirty work in the past.

Let them go to it! we say, this isn't the first pair of renegades that Town Topics has had to deal with, nor in all probability will it be the last, inasmuch as we will continue to expose all graft and corruption regardless of who the guilty persons may be.

Defenses in Criminal Libel

The defenses to criminal libel must be distinguished between defenses for libels to reputation and the class of criminal libels which includes obscene and blasphemous libels.[19]

At common law, truth was not considered a defense for the doctrine applied was "the greater the truth the greater the libel." With the enactment of Lord Campbell's Act, truth in criminal libel was accepted as a defense in England when the alleged libel was published for the public benefit. In the United States truth is accepted as a defense in some states while in others truth or justification as a defense to criminal libel is good only when the alleged libel is published with good motives and for justifiable ends.

Privilege and fair comment are both allowable as defenses to criminal libel but if the plaintiff establishes that the defendant intended by his act to publish the libelous statement, his act will be regarded malicious so as to offset either the defense of privilege or the defense of fair comment.

In blasphemous libel any fair comment in a discussion of the Deity, if seriously and sincerely prepared and given, would be regarded as a defense. In blasphemy truth is not a defense.

§ 45. SPECIAL CHARACTERISTICS IN CRIMINAL LIBEL

Libel of the dead and of large groups or organizations is subject to criminal action; malice is essential but publication need not be to third party.

A libel on a dead person is not actionable in a civil suit for damages; the legal theory on which this principle is based is that a

[19] Refer to chapters on Justification, Qualified Privilege, and Fair Comment.

person's reputation dies with him; however it would be criminally libelous to publish a libel on a dead person on the theory that the offended relatives of the dead person may be so angered that they would have a tendency to make an assault upon the offending party or parties. It would not be necessary that an assault and battery actually take place, but only that there be a tendency for the offended relatives to cause a public disturbance or breach of the peace.

In effect, the possibility of a libel on a dead person is one of the distinguishing characteristics of a libel as a crime or a misdemeanor. The natural tendency of a libel on the dead would be to bring the family of the dead person or his associates into discredit.

According to State v. Haffer,[20] any desecration of the memory of an historical character if such as to expose his memory to hatred, contempt, or ridicule constitutes criminal libel. In this case the publication was a severe chastisement of the memory of George Washington, who at the time of the publication had been dead for more than one hundred years. The question was raised whether it would be legally possible to defame the character of one who had been so long dead. The answer to this question was in legal theory predicated on Rex v. Topham,[21] called by the late Lord Coleridge the *locus classicus* on the subject of libel on the memory of one deceased.

Lord Kenyon in Rex v. Topham,[22] a case which concerned an alleged libel reflecting on the memory of the late Earl Cowper, stated:

> Now to say, in general, that the conduct of a dead person can at no time be canvassed; to hold that, even after ages have passed, the conduct of bad men cannot be contrasted with the good—would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity * * * then it is done with a design to break the peace, and then it becomes illegal. But on that question the jury ought to have had the power to deliberate.

[20] 94 Wash. 136, 162 P. 45, L.R.A. 1917C, 610, Ann.Cas.1917E, 229 (1916). The decision was based on statute, Laws 1909, p. 940, § 172; Rem. & Bal. Code, § 2424.

[21] (1791) 4 T.R. 126.

[22] Ibid., 129.

Libel of a Group

Although in a civil case for libel the person must be identified, a criminal action for libel may be prosecuted for a libel to a group. It would be possible therefore to libel the members of the American Federation of Labor, Veterans of Foreign Wars, Knights of Columbus, the Elks, the Masons, or the Lutheran Church, although the libelous statement could not be proved applicable to any one particular member. In People v. Spielman,[23] the following defamatory statement was published:

> **The Finest of the Fine.**
>
> The American Legion, this instrument bought with British money to suppress the truth, to gag freedom of conscience, to beat down every free expression of opinion, to betray organized American labor—this American Legion demands the scalp of Police Commissioner Miller of St. Louis. Mr. Miller has in plain terms given expression to a naked truth, in that he has established the fact, that the number of crimes in America show an actually fearful increase, and that the second place, 85 per cent of all crimes must be attributed to the war veterans. Even the one who knows himself free from any malevolence against the war veterans, who in overwhelming majority did not enter the army in exuberant enthusiasm, but under bitter legal compulsion, will find nothing objectionable in Miller's statement. * * *
>
> The American Legion, as you know, goes about peddling the claim that it embodies the cream of the nation. It tries to make people believe, that in itself the best and noblest elements of the American people are united. Patriotism and love of country, and, what is herewith combined, unselfish devotion to its American fellow-citizens, belongs to its copyhold, and its American native country owes it a special reverence, because it so spontaneously sprang to her defense. That is, of course, an audacious lie. Those who in the year 1917 (as already previously in the years of American neutrality) voluntarily took up arms, were quite other than the cream. They were simply the refuse of the nation. Those who really had adopted the trade of war as a means of making a living, were indeed the best among them, and they were almost without exception, tramps, vagabonds, and bums who did not make any specially brilliant guard for the starry banner. With them stood the many, altogether too many, who already had worn the prison stripes, and for whom the army was far less an opportunity to rehabilitate their civil honor, than it was to evade the Spanish curtains.
>
> Somewhat of this caliber were the overwhelming majority of the American volunteers of the year 1917, who according

[23] 318 Ill. 482, 149 N.E. 466 (1925).

to the tradition of the past decades, undeniably placed the American uniform only a shade higher than the garb of the prison house. People of this character, we repeat, were, almost exclusively, either those who found themselves ready or those who found themselves condemned to carry on the crusade for the Washington hostility to Germany, clothed in humanitarian phrases. Hoboes and dull lads that was the company, upon which the Wilsons and Morgans, the servants of Britain and the friends of France relied. Truly a worthy tool for a worthy cause.

The state supreme court in upholding the conviction stated:

> Criminal liability for libels rests upon their tendency to provoke breaches of the peace. The libel need not be on a particular person. It may be upon a family, class, corporation, or other body. A libel upon a class or group has as great a tendency to provoke a breach of the peace or to disturb society as has a libel on an individual, and such a libel is punishable even though its application to individual members of the class or group cannot be proved.[24]

In Crane v. State[25] in which the Knights of Columbus lodge was libeled, the court in affirming the conviction by the trial court noted:

> The law is intended to, and does, protect the self-respecting, law-abiding citizen against these calumnies, whether made against an individual specifically, or a class of individuals collectively.

Criminal Malice

Malice is commonly regarded as an essential in criminal libel. In a civil libel the element of malice is not essential, for if there is any publication of defamatory material, malice in law is presumed; it is sufficient in civil libel to establish publication, identification of the person allegedly libeled, and defamation. If there is actual hatred or actual malice, such malice will overcome the defense of either qualified privilege or fair comment and may at common law be the basis of punitive damages. In criminal libel actual malice, express or implied, is essential, as is so frequently stated in case reports. For example, in State v. Wilson,[26] it was said:

> In a civil action malice is not an essential element. In a criminal action it is.

[24] 318 Ill. 482, 489, 149 N.E. 466, 469.

[25] 14 Okl.Cr. 30, 166 P. 1110, 1115, 19 A.L.R. 1455 (1917).

[26] 137 Wash. 125, 241 P. 970, 972, 43 A.L.R. 1263 (1926).

In State v. Shaffner [27] the court noted:

> Malice is the essence of the offense, and is the wrongful doing of an act with the intention to do harm.

In practice however, actual malice is not required as an element essential to the successful prosecution of the case for the doing of the harmful act may be such as to indicate extreme recklessness or disregard of the rights of others. And by statute any false report on the unchastity of an innocent woman or the financial condition of a bank or other financial institution may be a criminal libel, irrespective of malice or intention.

Intentional defamatory publication implies malice in law, irrespective of malice in fact.[28]

In People v. Hebberd,[29] the court noted:

> Malice is essential in a criminal libel, and in that respect is different from a libel in a civil action, in which it is not necessary to establish malice, nor is proof of the non-existence of malice any defense, excepting where the plea of qualified privilege in a matter of public interest is interposed by a defendant.

In Commonwealth v. Snelling [30] the court pointed out:

> In a legal sense, any act done wilfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious.
>
> It is not necessary, to render an act malicious, that the party be actuated by a feeling of ill-will towards the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if in pursuing that design, he wilfully inflicts a wrong on others, which is not warranted by law, such act is malicious.

The *rationale* of malice in libel is simply: that in civil libel so-called malice in law is always implied with the publication of any defamatory statement [31] with actual malice as a basis of punitive damages; in criminal libel malice in law may be either actual ill will or hatred or implied on the basis of a harmful defamatory act

[27] 2 Pennewill (Del.) 171, 44 A. 620, 621 (1899).

[28] State v. Clyne, 53 Kan. 8, 35 P. 789 (1894).

[29] 96 Misc. 617, 162 N.Y.S. 80, 93, 35 N.Y.Cr.R. 165 (1916).

[30] 32 Mass. 337, 340, 15 Pick. 337, 340 (1834).

[31] State v. Hosmer, 72 Or. 57, 142 P. 581 (1914).

predicated upon extreme carelessness, thoughtlessness, or disregard of another's right to reputation.

A libel for which an indictment would lie need not be communicated to a third person; [32] it is sufficient if the libel be communicated directly to the person libeled, for it is considered that a libel of a person published by the libeler to the person so libeled would have a tendency to cause a breach of the peace. In this respect, criminal libel differs from civil libel. This characteristic of criminal libel, though widely accepted by jurists and accredited writers on jurisprudence, was questioned in Rex v. Wegener,[33] a leading English case.

§ 46. WHEN THE FEDERAL GOVERNMENT INTERVENES

Publications that tend to corrupt public morals may be barred from the United States mail.

Congress may provide regulation of the mails so as to prevent postal service for any material that tends to endanger public morals.[34] This authority is clearly implied in the express power granted Congress by the Constitution to establish post offices and post roads.[35] The right to regulate mails includes both the right to refuse any material that tends to corrupt morals [36] or that incites murder and assassination.[37]

The constitutional guaranty of freedom of the press is not a shield for the violation of criminal law.[38]

Lotteries or any advertisement of lotteries are prohibited from use of the mails.[39] A lottery is a scheme in which there are three elements, a consideration paid, a prize, and a determination of the winners by lot or chance.[40] Violation of this provision in the postal service subjects the violator to a fine of not more than $1,000, or imprisonment for two years, or both. For a second offense the violator may be subjected to five years' imprisonment.[41]

[32] State v. Avery, 7 Conn. 266, 18 Am.Dec. 105 (1828).

[33] 2 Stark. 245 (1817).

[34] In re Rapier, 143 U.S. 110, 12 S. Ct. 374, 36 L.Ed. 93 (1892).

[35] Ex parte Jackson, 96 U.S. 727, 24 L.Ed. 877 (1877).

[36] Griffin v. U. S., 248 F. 6 (C.C.A. Mass.1918).

[37] Magon v. U. S., 248 F. 201 (C.C. A.Cal.1918).

[38] Knowles v. U. S., 170 F. 409 (C. C.A.S.D.1909).

[39] P.L. & R., Sec. 601.

[40] Brooklyn Daily Eagle v. Voorhies, 181 F. 579 (C.C.N.Y.1910).

[41] For further discussion of lot-

Use of the mails is denied also to all fraudulent matter relating to schemes for obtaining money by false pretenses [42] or foreign newspapers or periodicals which violate copyrights granted by the United States.[43]

Any newspaper or writing containing matter deemed to be disloyal to the United States or advocating or urging treason, including insurrection, or forcible resistance to any law of the United States is nonmailable and any person depositing such material in the mails for distribution is subject to a fine of not more than $5,000, or imprisonment of not more than ten years, or both.[44]

teries, see the Chapter on Regulation of Advertising.

[42] a. P.L. & R., Sec. 603; 18 U.S.C.A. §§ 338, 339; U. S. v. Loring, 91 F. 881, 883 (D.C.Ill.1884):

"It would seem too plain to require argument that the power of congress to establish post offices and post roads not only involves the right to create and maintain our postal system, but carries with it, as a necessary incident to that power, the right of congress to determine what shall be carried or transported by means of such postal system, and certainly that congress has the right to enact that no matter shall be carried in the mail for the purpose of furthering a crime or fraud."

b. Harrison v. U. S., 200 F. 662, 665 (C.C.A.Ohio 1912):

"It is by the decisions settled, not as an all-inclusive definition, but as one sufficient for the purposes of this case, that the statutory 'scheme to defraud' may be found in any plan to get money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange; and this deception may, of course, be by implication as well as express words. On the other hand, the 'scheme' cannot be found in any mere expression of honest opinion as to the quality or as to future performance. There must be the underlying intent to defraud."

c. Durland v. U. S., 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896):

"It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury, they may be absolutely ineffective therefor."

d. Lemon v. U. S., 164 F. 953, 957 (C.C.A.Ark.1908):

"The mailing of a letter in the execution or attempted execution of a fraudulent scheme is the gist of the offense. * * * It is that act, and it alone, which confers jurisdiction upon the courts of the United States to punish devisers of fraudulent schemes. The letter which is mailed is not required to recite the whole scheme or be in itself effective to execute it. All that is imperatively required is that the letter mailed should be one calculated or designed to aid or assist in the execution or attempted execution of a scheme already devised."

[43] P.L. & R., Sec. 523; 39 U.S.C.A. § 227.

[44] P.L. & R., Sec. 600, #1, #2, and #3.

Any person who knowingly and willfully deposits any publication or writing in the mail threatening to take the life of the President of the United States shall upon conviction be fined not exceeding $1,000 or imprisoned for a term not exceeding five years, or both.[45]

Any use of the mails for the distribution of material interfering with the armed forces of the United States subjects such violator to a fine of not more than $5,000, or imprisonment of not more than ten years, or both.[46]

Stringent Post Office regulations [47] provide that every obscene, lewd, or lascivious publication may be barred from the United States mails. Whoever knowingly violates this provision is subject to a fine of not more than $5,000, or imprisonment of not more than five years, or both.

The fine or imprisonment or both would not necessarily be imposed unless copies containing the obscene, lewd, or lascivious matter were deposited in the mails after determination by the Post Office department that the copies were nonmailable under the statute. This statute prohibits mailing of "indecent" matter, and as this term is used in the statute includes matter of a character which might incite arson, murder, or assassination.

Under this statute, Ken Magazine, Vol. 1, No. 3, dated May 5, 1938, was declared unmailable in violation of Section 211 of the United States Penal Code.[48]

The offending article was titled "Los Angeles Sporting Girl" under the name of Pearl Thompson. The article was of the confession type as known to newspaper men and feature article writers. It gave the philosophy of a prostitute who described the advantages, disadvantages, risks, working schedule, earnings, and pleasures of her profession as she viewed these problems on the basis of personal experience. She answered many questions of the type that customers and reformers are said to ask, and moreover gave an attempted ennoblement of her "profession." She endeavored to point out the hypocrisy of the public, particularly of many of her customers who were normally accepted by self-respecting society.

[45] P.L. & R., Sec. 598, #3.

[46] P.L. & R., Sec. 600, #1 and Note under #3.

[47] Sections 211 and 212 of the Act of Congress approved March 4, 1909 (35 Stat. 1129, as amended by the Act of March 4, 1911), 18 U.S.C.A. §§ 334, 335. P.L. & R., Sec. 598.

[48] 18 U.S.C.A. § 334.

The publisher of *The Lantern* at Deadwood, South Dakota, was found guilty and his conviction was affirmed by the circuit court of appeals for his printing and circulating of the following article in his newspaper: [49]

> A good illustration of the beauties of our social system was recently given when "society" in Lead and Deadwood was convulsed by the news that a most sweet and amiable young woman had died at Denver from the effects of an operation performed upon her to hide what society calls her "shame." And what was this thing which society blasphemously brands as "shame"? Why, simply that an unmarried girl having disregarded the sanctions of some priest or magistrate, had made the discovery that God had worked in her the wonderful miracle of motherhood. So this poor girl, having been taught from infancy that such a thing constituted "shame," kills her unborn child and in so doing kills herself. That the father and mother of this murdered child were designed by nature for each other is proven by the fact that they could not resist their mutual attraction, even in the face of great social peril. Love had its way, and God blessed the union with the most stupendous fruit of the universe, a human child; and "society" steps in and cries "shame" and causes the mother to kill both herself and her child. It is a well established fact in physics as well as in history that there are no children so likely to be healthy, robust, so mentally and bodily fit to survive as those very "love children" who are killed in the wombs of foolish mothers driven to do the fiendish deed by "society" and public opinion. Since the dawn of history, the great army of genius has been largely recruited from the ranks of illegitimates. Love's offerings have filled the earth with art, music, poetry, and wisdom, as if putting to shame those very ones who cry "shame" and as taunting them with their own inferiority. Society is as guilty of the murder of this girl as though she had been put to death by the public hangman.

In U. S. v. Dennett,[50] the defendant was indicted for violation of the United States Postal regulations [51] and convicted in the district court; her conviction was reversed in the United States Circuit Court of Appeals. The facts of this case give a rather clear view of what does and what does not constitute obscenity, so far as purpose is concerned. The defendant, the mother of two young boys, wished to advise them intelligently on sexual facts. Not finding what she wanted from available literature on the subject she prepared some material, copies of which were later sent through the mails.

[49] Knowles v. U. S., 170 F. 409 (C.C.A.S.D.1909).

[50] 39 F.2d 564, 76 A.L.R. 1092 (C.C.A.N.Y.1930).

[51] 18 U.S.C.A. § 334.

The article, which explained the physiological and emotional bases of sex, stated in part:

> Young people are just as capable of being guided and inspired in their thought about sex emotions as in their taste and ideals in literature and ethics, and just as they imperatively need to have their general tastes and ideals cultivated as a preparation for mature life, so do they need to have some understanding of the marvelous place which sex emotion has in life.
>
> Only such an understanding can be counted on to give them the self-control that is born of knowledge, not fear, the reverence that will prevent premature or trivial connections, the good taste and finesse that will make their sex life when they reach maturity a vitalizing success. * * *
>
> People's lives grow finer and their characters better, if they have sex relations only with those they love. And those who make the wretched mistake of yielding to the sex impulse alone when there is no love to go with it, usually live to despise themselves for their weakness and their bad taste. They are always ashamed of doing it, and they try to keep it secret from their families and those they respect. You can be sure that whatever people are ashamed to do is something that can never bring them real happiness. It is true that one's sex relations are the most personal and private matters in the world, and they belong just to us and to no one else, but while we may be shy and reserved about them, *we are not ashamed.*
>
> When two people really love each other, they don't care who knows it. They are proud of their happiness. But no man is ever proud of his connection with a prostitute and no prostitute is ever proud of her business.

In reversing the decision of the lower court, the court explained the purpose of the article in the following words:

> It negatives the idea that the sex impulse is in itself a base passion, and treats it as normal. * * * It warns against perversion, venereal disease, and prostitution, and argues for continence and healthy mindedness and against promiscuous sex relations.[52]

Reproductions of stamps, money, and securities of the United States are prohibited publications.[53] Printing of foreign postage or revenue stamps from defaced plates and of portions of United States stamps in black and white is allowed.

The United States flag may not be used as a trade-mark nor for advertising purposes.[54]

[52] C.C.A.N.Y., 39 F.2d 564, 567, 76 A.L.R. 1092.

[53] 18 U.S.C.A. §§ 348–350; § 292.

[54] 15 U.S.C.A. § 85; 4 U.S.C.A. § 3.

Consular and commercial reports of the United States Department of Commerce are not permitted to be published if they discuss partisan political, religious, or moral questions.[55]

§ 47. OBSCENE PUBLICATIONS

Lewd, indecent stories, articles, and pictures tending to corrupt the morals are regarded as criminally libelous.

Publications are regarded as criminally libelous, when and if there is a tendency for the words or pictures to corrupt the minds of those persons into whose hands they must fall. Publications which tend to corrupt the morals of society are regarded as criminal libel in tending to cause a breach of the peace.[56]

Determination of what is obscene comes within the range of ordinary intelligence and sense of social responsibility. The test of obscenity, upon the basis of authoritative cases, is whether a particular writing or picture tends to deprave or corrupt those whose minds are susceptible to immoral influences, that is, particularly those who are young, ignorant, or lacking in control of sexual impulses and who would be likely to come into contact with such presentations.[57] In People v. Muller,[58] the court indicated that stimulation to libidinous or lecherous thoughts alone could not be the test, stating in part as follows:

> It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting and sculpture as all know represent nude human forms. It is a false delicacy and mere prudery which would condemn and banish from sight all such objects as obscene, simply on account of their nudity. If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behavior and bearing may suggest to a prurient imagination images of lust, and excite impure desires, and so may a picture or statue not in fact indecent or obscene.

[55] 15 U.S.C.A. § 190.

[56] Commonwealth v. Sharpless, 2 Serg. & R., Pa., 91, 101, 7 Am.Dec. 632 (1815).

[57] Regina v. Hicklin (1868) L.R. 3 Q.B. 360, 18 L.T. 395; U.S. v. Bebout, 28 F. 522 (D.C.Ohio 1886); People v. Seltzer, 122 Misc. 329, 203 N.Y.S. 809 (1924); Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472, 69 A.L.R. 640 (1930), upholding the conviction for selling "The American Tragedy"; U. S. v. Dennett, 39 F.2d 564, 76 A.L.R. 1092 (C.C.A.N.Y.1930).

[58] People v. Muller, 96 N.Y. 408, 411, 48 Am.Rep. 635 (1884).

When licentiousness begins freedom of the press ends to that extent, for liberty is not license;[59] filth, though it may be tawdrily dressed up or concealed, remains filth [60] whatever its form of expression or time of publication. That which is obscene connotes filth, impurity, indecency, and immorality.

Naturally, the question arises as to what will deprave the minds of the young. Clearly, there are publications which would fall within the definition used in Regina v. Hicklin;[61] there are other publications which are open to question. It must be realized that what is obscene differs according to the customs of a people, the place of publication, the time of the publication, and the personality of the court.

In a given case the distinction between the obscene and the artistic or the scientific may be difficult. What may be obscene in Boston may be art in San Francisco.

What would have been considered obscene in a small American town of the so-called "Gay Nineties" might be considered art in the New York of the twentieth century. Nudity in itself is not obscenity, as any visitor to the great art galleries may see for himself.

Many of the art treasures of the world have nude figures, a great majority of which have the approval not only of art critics but also of cultured persons generally; nudity in itself has not been generally recognized as obscene, although false emphasis might be made the basis for court action on the ground of obscenity.

There is a wide difference between purely pornographic pictures and literature and cultural art. Pictures which might be clearly useful in art classes might well be frowned upon by the courts when and if exhibited and exploited before the adolescent. Case photographs of great value to scientists in the fields of obstetrics and gynecology might be regarded as obscene if exhibited in general publications. There is, too, a more liberal attitude generally about sex than was prevalent in the latter part of the nineteenth century, especially in the United States. Whether a growing laxity in this regard tends to immorality is an ethical question not within the confines of this study.

[59] U. S. v. Harmon, 45 F. 414 (D.C. Kan.1891).

[60] People v. Berg, 241 App.Div. 543, 272 N.Y.S. 586, aff.; 269 N.Y. 514, 199 N.E. 513 (1935).

[61] (1868) L.R. 3 Q.B. 360, 371; People v. Muller, 96 N.Y. 408, 48 Am. Rep. 635 (1884); P.L. & R. See 598.

To pass opinions on what is obscene there are the several state jurisdictions, the Federal courts, and the unofficial agencies such as the Watch and Ward Society of Boston and the New York Society for the Suppression of Vice. Both the Watch and Ward Society and the Society for the Suppression of Vice have been active in fighting obscenity wherever it may be found, books, stage or screen; the Watch and Ward Society in particular has been the effective agency in having many books declared obscene in Boston.

The United States Treasury under the Tariff Act has exercised the power to forbid the entry of obscene material into the United States. Since 1930, through amendment of the Tariff Act, a jury trial is assured whenever the seizure of a book or newspaper is made on the ground of obscenity; the government is now required to press the proceedings, not the addressee. The Secretary of the Treasury may admit classics, recognized literary works, and books of a scientific nature even if these may be considered obscene.[62]

The life and experiences of a prostitute were the subject of a book issued by Harper & Brothers, who were prosecuted [63] under the Penal Law of New York, Section 1141. In the portrayal the book, "Madeleine" recited moral delinquencies of a young woman, her experiences in various houses of prostitution in various communities, and her mental reactions to the life in which she engaged. The court reversed the conviction of the court below on the ground that no one could read the book and say truthfully that it contained a single word or picture which tended to excite lustful or lecherous desire; it was further held that the defendant Brainard, who was president of the publishing firm, knew nothing about the approval of the manuscript by the editorial council or board of the publishing house and so that with no knowledge or intent he himself could not be convicted of an offense under the statute even though the book itself were found immoral.

In another case, People v. Pesky,[64] the defendant was convicted of unlawfully possessing an indecent book, "Hands Around," or from the German, "Reigen," announced as a book for private circulation. In the work ten dialogues were given. The first gave the solicitation of a soldier by a prostitute, the second the

[62] 19 U.S.C.A. § 1305.

[63] People v. Brainard, 192 App.Div. 816, 183 N.Y.S. 452, 38 N.Y.Cr.R. 470 (1920).

[64] People v. Pesky, 230 App.Div. 200, 243 N.Y.S. 193 (1930); aff.: 254 N.Y. 373, 173 N.E. 227 (1930); Reargument denied: 255 N.Y. 576, 175 N.E. 320 (1930).

dialogue between a soldier and a parlor maid, and the third the conversation of a parlor maid with a young man whose parents were absent in the country.

Reconciliation of the two foregoing cases might seem difficult without actually observing and studying the treatment of the material contained in the respective volumes. In the one, although the court observed that it could see no useful purpose in publishing such a book, there might be regarded the sociological aspects of one who violated the moral code of society; in the other, merely suggestive material was even more suggestively presented.

In contrast with the foregoing case might be noted People v. Viking Press,[65] in which the publishers of "God's Little Acre" were prosecuted under the same penal statute. This book purported to portray realistically the fashion of life of an illiterate Southern white family. A daughter of this family was married to a worker in a Southern mill town, thus setting the background for the interaction between life on a run-down farm and life in the mill town. The book showed that on the farm and in the town the people were primitive and impoverished, that they were deprived of many opportunities for development, and that their activities were largely sexual. The court in reaching its decision noted the opinions of a large number of literary critics who emphasized the literary value of the volume and in its examination of the meaning of the statute pointed out that the purpose of the statute was aimed at pornography.[66] Clearly, the story in question pictured a stratum of life, its purpose to reflect the poverty, the absence of cultural background, and the spiritual impoverishment of a segment of American life; its purpose was not to stimulate pornographic thoughts and desires. For such reasons, the court held that "God's Little Acre" did not violate the statutory enactment in either spirit or fact.

An American Tragedy by Theodore Dreiser,[67] *Three Weeks* by Elinor Glyn,[68] and *Female* by D. H. Clarke [69] have been held obscene, although in the case of *Female,* the court refused to

[65] 147 Misc. 813, 264 N.Y.S. 534 (1933).

[66] People v. Muller, 96 N.Y. 408, 410, 48 Am.Rep. 635 (1884): "It does not require an expert in art or literature to determine whether a picture is obscene or whether printed words are offensive to decency and good morals."

[67] Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472, 69 A.L.R. 640 (1930).

[68] Commonwealth v. Buckley, 200 Mass. 346, 86 N.E. 910, 22 L.R.A.,N. S., 225, 128 Am.St.Rep. 425 (1909).

[69] People v. Berg, 269 N.Y. 514, 199 N.E. 513 (1935).

mention the name of the book because it did not wish to give the work undue publicity.

Among the books banned in Boston on the ground of obscenity [70] the following may be noted.

> The Wayward Man by St. John Ervine, Dark Laughter by Sherwood Anderson, High Winds by Arthur Train, Blue Voyage by Conrad Aiken, What I Believe by Bertrand Russell, Circus Parade by Jim Tully, Black April by Julia Peterkin, An American Tragedy by Theodore Dreiser, The World of William Clissold by H. G. Wells, Manhattan Transfer by John Dos Passos, Count Bruga by Ben Hecht, The Captive by Edward Bourdet, Young Men in Love by Michael Arlen, The Plastic Age by Percy Marks, The Marriage Bed by Ernest Pascal, Elmer Gantry by Sinclair Lewis, The Sun Also Rises by Ernest Hemingway, Master of the Microbe by Robert Service, Cleopatra's Diary by Henry Thomas, The Revolt of Modern Youth by Judge Ben Lindsey, Simon Called Peter by Robert Keable, The Decameron by Boccaccio, Gargoyles by Ben Hecht, Sane Sex Life by Harland William Long, Many Marriages by Sherwood Anderson, Janet March by Floyd Dell, Flaming Youth by Warner Fabian, The Art of Love by W. F. Robie, Streets of Night by John Dos Passos, Proud Flesh by Lawrence Rising, Antic Hay by Aldous Huxley, and Nigger Heaven by Carl Van Vechten.

When the receiver of the Worthington Co.[71] asked the court for instructions regarding the sale of certain classical works held as assets, the court held that these classics were not obscene and could be offered for sale. The books included Payne's edition of the Arabian Nights, Fielding's novel, Tom Jones, the works of Ralelais, Ovid's Art of Love, the Decameron of Boccaccio, the Heptameron of Queen Margaret of Navarre, the Confessions of J. J. Rousseau, Tales from the Arabic, and Aladin. The court emphasized that what had been wrought into the very structure of the English language should not be pronounced unfit for publication or stamped with judicial disapproval as injurious to the community.

In *Life* Magazine in its April 11, 1938 issue [72] there were presented photographs from the motion picture, "The Birth of a Baby." While the distribution of this magazine was suppressed in several cities, there was wide acceptability of the presenta-

[70] Grant, S. S., and Angoff, S. E., Massachusetts and Censorship, 10 Boston University Law Review 36, 41, 47 (Jan.1930).

[71] In re Worthington Co., Sup., 30 N.Y.S. 361, 62 N.Y.St.Rep. 115, 24 L. R.A. 110 (1894).

[72] Vol. 4, No. 15, pp. 33–36.

tion by social workers and physicians. The reaction seemed to be that the presentation was handled in a sane, scientific manner and that the educational and moral value of the photographs was high. The motion picture was not usually shown in any section of the country until some local physicians had given their approval and of course all the photographs in *Life* were based on the motion picture. The film's first showing took place in the city of Minneapolis before local physicians, their wives, nurses, and medical students, who voted their approval by a vote of 1,995 to 40.

Obscene pictures tend to incite lust quite as much as obscene writings. Such pictures are barred from the United States mails and are subject to state statutes on obscenity. The defendant in Commonwealth v. Sharpless [73] was convicted for exhibiting for money a lewd, scandalous, and obscene painting. Conviction was upheld for selling obscene photographs in the historic case of People v. Muller.[74] In People v. Baylinson,[75] the defendant escaped conviction on the ground that as secretary of an artists' association he had no voice in the exhibition of the painting and that the prosecution did not sufficiently connect him with the crime if a crime had been committed. The painting showed Christ at the marriage feast of Cana at Galilee turning water into wine before characters in modern street clothes representing ex-Congressman Volstead, William H. Anderson of the Anti-Saloon League, and William Jennings Bryan.

Experts' opinions have been held inadmissible,[76] although it may be shown that a certain work has been widely recognized, or on the contrary, condemned by the critics. The real test is to be made by the jury as representative of the average men and women. In passing upon the question whether a newspaper story, a book, or a picture tends to corrupt the public morals, a jury would not be justified in considering only the feeling of an artist.[77]

In People v. Fellerman,[78] the defendant was convicted of a

[73] 2 Serg. & R., Pa., 91, 7 Am.Dec. 632 (1815).

[74] 96 N.Y. 408, 48 Am.Rep. 635 (1884).

[75] 211 App.Div. 40, 206 N.Y.S. 804 (1924).

[76] People v. Seltzer, 122 Misc. 329, 203 N.Y.S. 809 (1924).

[77] Commonwealth v. Buckley, 200 Mass. 346, 86 N.E. 910, 22 L.R.A.,N.S., 225, 128 Am.St.Rep. 425 (1909).

[78] 243 App.Div. 64, 276 N.Y.S. 198 (1934); motion to dismiss appeal denied: 268 N.Y. 514, 198 N.E. 381 (1935); aff.: 269 N.Y. 629, 200 N.E. 30 (1936).

violation of the New York Penal Law, Section 1141, which in part follows:

> A person who sells * * * any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine * * * picture, * * * photograph * * * or any written or printed matter of an indecent character * * *
>
> Is guilty of a misdemeanor.

The crime charged in the information was the sale of a magazine known as the "Nudist," containing indecent and obscene pictures of persons in Nudist camps and colonies engaged in nudist activities. The court affirmed the conviction of the defendant on the ground that the pictures could not be classified as photographs of works of art, but rather as "provocative pictures" of no educational value and that the pictures tended to lower the standards of right and wrong, offend modesty, and be subversive of morality.

Jonathan Banks was arrested under a state statute on a warrant charging him with selling [79] the *Kansas City Sunday Sun*, alleged to be a newspaper "devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons." The court found the defendant guilty.

Several other states have upheld statutes directed against the dissemination of lewd and obscene newspapers. In Strohm v. People,[80] an Illinois statute, entitled, "An act to suppress selling, lending, giving away or showing to any minor child any paper or publication principally devoted to illustrating or describing immoral deeds," was upheld. It would seem that inasmuch as this statute did not prevent publishing of a newspaper, lewd or otherwise, there would be no violation of the Fourteenth Amendment to the Federal Constitution; further, its prohibition was limited to distribution of such papers or periodicals to minor children. In State v. Van Wye,[81] a Missouri statute which declared one guilty of a felony who engaged in the business of editing, publishing, or disseminating a paper devoted mainly to the publication of scandals and immoral conduct, was upheld as constitutional in that state. None of the foregoing cases was tested in the United States Supreme Court, but the Min-

[79] In re Banks, 56 Kan. 242, 243, 42 P. 693 (1895).

[80] 160 Ill. 582, 43 N.E. 622 (1896).

[81] 136 Mo. 227, 37 S.W. 938, 58 Am. St.Rep. 627 (1896); see State v. McKee, 73 Conn. 18, 46 A. 409, 49 L.R.A. 542, 84 Am.St.Rep. 124 (1900).

nesota statute which provided for enjoining the publisher of an obscene, lewd, and lascivious newspaper or a malicious, scandalous, and defamatory newspaper, magazine, or other periodical, although upheld in the state supreme court, was held illegal in the United States Supreme Court on the ground that it violated the Fourteenth Amendment to the United States Constitution by denying liberty of the press without due process of law.[82]

Newspaper stories, articles, or illustrations which give information on methods of avoiding conception are denied the use of the United States mails.[83] Through the Tariff Act the Federal government prohibits books, pamphlets, and materials the purpose of which is birth control.[84] Such statutes have been held constitutional.[85]

Breaking away from the traditional legal view of obscenity, Judge Learned Hand in U. S. v. Kennerley,[86] while upholding the older view in effect, gave an opinion on the need for a more sensible social view of the standards by which alleged obscene writings should be judged, as follows:

> I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature.

[82] Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

[83] 18 U.S.C.A. § 334.

[84] 19 U.S.C.A. § 1305.

[85] Ackley v. U. S., 200 F. 217 (C.C.A.Mo.1912); Tyomies Pub. Co. v. U. S., 211 F. 385 (C.C.A.Mich.1914); Harman v. U. S., 50 F. 921 (C.C.Kan. 1892), following Ex parte Jackson, 96 U.S. 727, 24 L.Ed. 877 (1878), and Ex parte Rapier, 143 U.S. 110, 12 S.Ct. 374, 36 L.Ed. 93 (1892) and reversing on another ground U. S. v. Harmon, 45 F. 414 (D.C.Kan.1891); U. S. v. Bennett, 16 Blatchf. 338, 24 Fed. Cas.No.14,571 (1879); Knowles v. U. S., 170 F. 409 (C.C.A.S.D.1909); Coomer v. U. S., 213 F. 1 (C.C.A.Okl. 1914); Rinker v. U. S., 151 F. 755 (C.C.A.Kan.1907); U. S. v. One Obscene Book entitled "Married Love," 48 F. 2d 821 (D.C.N.Y.1931); U. S. v. One Book entitled "Contraception," 51 F. 2d 525 (D.C.N.Y.1931); U. S. v. One Package, 86 F.2d 737 (C.C.A.N.Y. 1936), aff. D.C.N.Y. 13 F.Supp. 334.

[86] 209 F. 119, 120 (D.C.N.Y.1913).

In this case Judge Hand overruled the demurrer to the complaint which charged that the novel *Hagar Revelly* was obscene.

There is indication of a more liberal view of obscenity as an offense; it is recognized that language which may be coarse, vulgar, and even profane is not necessarily obscene.[87] In holding that Mademoiselle De Maupin by Theophile Gautier was not obscene, the court stated:

> It contains many paragraphs, however, which, taken by themselves, are undoubtedly vulgar and indecent.
>
> No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible. The book, however, must be considered broadly, as a whole.[88]

Breadth of viewpoint on the part of the courts is shown in the opinion given in U. S. v. One Book Entitled Ulysses by James Joyce.[89] The book was refused admission into the United States on the ground of obscenity, although for some years previous it had been smuggled into the country. In holding that the book was not obscene within the scope of the statute, the court stated:

> It is settled, at least so far as this court is concerned, that works of physiology, medicine, science, and sex instruction are not within the statute, though to some extent and among some persons they may tend to promote lustful thoughts. We think the same immunity should apply to literature as to science, where the presentation, when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication. The question in each case is whether a publication taken as a whole has a libidinous effect.[90]

Judge Philips in U. S. v. Harmon,[91] though holding the defendant guilty, made a sagacious observation which would be well for all courts to remember, "To the pure all things are pure, is too poetical for the actualities of practical life." Theoretical censorship of morality may be mere prudery.

[87] Knowles v. U. S., 170 F. 409 (C.C.A.S.D.1909).

[88] Halsey v. New York Society for the Suppression of Vice, 234 N.Y. 1, 136 N.E. 219, 220, aff. 194 App.Div. 961, 185 N.Y.S. 931 (1920).

[89] 72 F.2d 705 (C.C.A.N.Y.1934).

[90] Ibid., 707.

[91] 45 F. 414, 423 (D.C.Kan.1891).

§ 48. OBSCENITY NOT PRIVILEGED

Reports of judicial proceedings in which obscene testimony is taken are not subject to qualified privilege.

Newspaper reports of obscene testimony in judicial proceedings are not protected by qualified privilege, although the courts generally are hesitant to convict a publisher who has reported a true and fair account of such proceedings. Newspaper reports of obscene discussions in legislative assemblies, though absolutely privileged as to the legislators, are not protected by qualified privilege,[92] it would seem.

In the trial of Henry C. Beattie, Jr., indicted for murder, the *Richmond Evening Journal* published the testimony of a physician and the murdered girl's mother concerning the examination of a young woman friend of the accused and an examination of the accused's underwear. The Federal government brought an indictment against the newspaper on the ground that the story was too obscene, lewd, and lascivious to be placed in the mails. The defendant newspaper moved to quash the indictment and this motion was sustained by the court.[93]

Reports of the trial of Harry Thaw for murder in three Louisville newspapers brought an indictment by the state of Kentucky on the ground of selling obscene literature or papers.

The court held that the newspaper stories were truthful records of the testimony at the trial and that they did not come within the Kentucky obscenity statute. In its decision acquitting the three newspapers, the court stated:

> In the publication of court proceedings, and transactions of public bodies, greater latitude must necessarily be allowed than would be permitted in the publication of matters of a more private or personal character. * * *
>
> We do not mean to hold that a newspaper is privileged to publish all the filthy and disgusting details that are developed by the evidence in court proceedings, or that sometimes come out in the scandals that appear in private life. There may be facts brought out on the trial of a case or in the exposure of an individual that would be so shocking to every sense of common decency as that to publish them would certainly be a violation of the statute.[94]

[92] U. S. v. Journal Co., Inc., 197 F. 415 (D.C.Va.1912).

[93] Ibid., 418.

[94] Commonwealth v. Herald Pub. Co., 128 Ky 424, 108 S.W. 892, 895, 16 Ann.Cas. 761 (1908).

In a notable English case, Steele v. Brannon,[95] it was held that a report of the trial of one George Mackey on the charge of selling an expurgated edition of *The Confessional Unmasked* which in its full edition had been declared obscene in Rex v. Hicklin,[96] was not privileged. The trial of Mackey ended in a disagreement of the jury, but in the report of his trial the publishers of the book added the full text of the book which had been condemned earlier.

Under the Judicial Proceedings (Regulation of Reports) Act, 1926,[97] it is not lawful in England to print or publish in relation to any judicial proceedings any indecent matter or indecent medical, surgical, or physiological details calculated to injure the public morals or in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or for restitution of conjugal rights, any particulars other than (a) the names, addresses and occupations of the parties, (b) a concise statement of the charges, defenses and countercharges in support of the evidence, (c) submissions on any point of law arising in the course of the proceedings and the decision of the court thereon, and (d) the summing-up of the judge, the finding of the jury in a jury case and the judgment and the opinion of the court in passing judgment.

§ 49. BLASPHEMOUS PUBLICATIONS

Articles that defile the Deity are misdemeanors tending to cause breaches of the peace.

Prosecution for criminal libel at common law may result from the use of blasphemous words in writing or printing, or by conduct which has more than an instantaneous effect such as would be given in oral expression. Blasphemy in a legal sense means words spoken or written which express a contempt for God or for things held sacred by mankind. In a broad sense, blasphemy may mean any irreverent declaration or profanity.

Blasphemy as defined by Bouvier means "to attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does." [98] To reproach God maliciously is blasphemy.[99]

[95] (1872) 26 L.T. 509, L.R. 7 C.P. 261.

[96] (1868) L.R. 3 Q.B. 360.

[97] (1926) 16 & 17 Geo. 5, c. 61.

[98] Bouvier, John, Law Dictionary (Rawle's 3d revision), p. 369.

[99] Commonwealth v. Kneeland, 20 Pick., Mass., 206 (1838). See also

Blasphemy does not mean that there cannot be a serious and honest criticism of Christian religion or of God, Jesus Christ, or the Virgin Mary, or that there cannot be a comparison of the ethics or values of different religious beliefs. To be actionable criminally, the blasphemous words must be truly irreverent and designed to bring Things or Persons Divine into contempt. Any effort to break down the public's faith in the commonly accepted tenets of divine thought may be prosecuted as criminal libel. While the Christian religion is not officially part of the law of the land, the American system of legal thought founded upon the common law of England does embrace the ethical principles of the Christian doctrine; courts are wont to take judicial notice of the common religious hopes and beliefs.

At common law it is a misdemeanor to revile God or the Christian religion on the ground that to do so offends the public's religious sense and induces a tendency to cause a breach of the peace. It is upon this fundamental principle that this phase of criminal libel is based.

Early in American jurisprudence, the authoritative case of People v. Ruggles [100] was decided. The offense charged in that case was that the defendant did "wickedly, maliciously, and blasphemously utter, in the presence and hearing of divers good and Christian people, these false, feigned, scandalous, malicious, wicked, and blasphemous words, to wit: Jesus Christ was a bastard, and his mother must be a whore." The higher court affirmed the judgment of the lower court for conviction. After reviewing early authorities of the common law, the court said:

> We stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue, which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. Nothing would be more offensive to the virtuous part of the community or more injurious to the tender morals of the young, than to declare such profanity lawful. * * *

Black, H. C., Law Dictionary (3d Ed.) p. 226.

[100] 8 Johns. 290, 5 Am.Dec. 335 (1811); see also State v. Chandler, 2 Harr., Del., 553 (1837); State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871 (1921); U. S. v. Klauder, 240 F. 501 (D.C.N.Y.1917).

> Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law.[101]

Profanity

Profanity when committed in public is punishable at common law as a public nuisance, and so a misdemeanor; in the several states, statutes amplify the common law as to this offense. Swearing in private is not a public nuisance; it is only when such swearing is offensive to public morals and religious ideals that the law takes cognizance of such an act. Strictly interpreted, swearing does not constitute a phase of criminal libel. Swearing is oral; however, when common profanity is used in writing or print so that there is publication, such profanity might be punished as criminal libel.

It is on the basis of offense to the public morals and welfare that profanity is prohibited. It has been held that the single uttering of a profane word does not constitute a public offense; it is necessary only for several persons to hear the profanity [102] in order that the offense be punishable. In a Canadian case, profanity was defined as an irreverence of that which is sacred or a disrespect for God.[103]

Language may be coarse and even vulgar, without being considered profane.

In Barker v. Commonwealth [104] in which the defendant was convicted for shouting violent, loud, and indecent language, the court said:

> The liberty of speech does not require that the clear legal rights of the whole community shall be violated. The freedom of the press is as well deserving as the liberty of speech; but no one, in his wildest enthusiasm in favor of the former, has claimed the right to establish printing presses in the public streets. One of Hoe's printing presses would certainly be as effectual in collecting a crowd as the indecent and violent harangues described in this indictment. The nuisance, in the one case, would be quite respectable in its nature and objects compared with the demoralizing character of the others. But both are prohibited by law, as infractions of the public right of passage.

Heresy

Heresy is not to be confused with blasphemy. Both heresy and blasphemy were offenses of the early church, but heresy itself

[101] 8 Johns. 290, 293–295, 5 Am.Dec. 335.

[102] Goree v. State, 71 Ala. 7 (1881).

[103] R. v. Ballantine (1914) 14 E.L.R. 278.

[104] 19 Pa. 412, 413 (1852).

was not considered a crime at common law. Heresy is not strictly a religious offense; it is the holding and expression of views on any subject which are considered by the great majority of mankind as fundamental and generally true.[105]

[105] Odgers, W. B., Slander and Libel (6th Ed.), p. 393ff.

CHAPTER 8

TRIAL OF THE LIBEL ISSUE

Sec.
50. Bars to an Action.
51. Parties to an Action.
52. Necessary Allegations.
53. Court and Jury.
54. Burden of Proof.
55. Proof of Malice.
56. Damages an Award for Injury.

§ 50. BARS TO AN ACTION

Statute of limitations, res judicata, consent, accord and satisfaction, and release bar libel actions.

When a libel case falls within certain categories, any action for relief is barred. If an action were commenced after the period permitted under the statute of limitations for defamation actions, the plaintiff could not press his action; the basis for this limitation is that the law does not countenance stale claims. If no action is allowed for defamation after a statutory period from the date of publication, the plaintiff, though he may have a substantive right to recover for injury to reputation, would fail in such recovery for lack of a procedural right.

Res judicata serves as another bar to an action, either at law or in equity. This principle means simply that if an issue has once been decided on its merits as between the parties to the action, the same parties cannot raise the issue a second time. A libel action that has once been decided by a competent tribunal, without an appeal being made, is decided for all time as between the particular parties. After a decision on the appeal, the same principle of *res judicata* applies.

Consent to be libeled is incongruous, for one would hardly consent to have his reputation injured. Nevertheless, there can be instances where consent to the publication of certain information may result in unexpected injury or special damages. In such a case, the plaintiff to an action could not recover for the reason that he gave his consent to the publication. An example in point is the case of a professional model who was employed by an advertising agency for an account with a public health

institute. The agency ran copy in which the model was pictured and described as having a venereal disease. The model in such a case could not be heard to complain for when he was employed he should have been aware that the business of the public health institute is to treat dangerous, communicable diseases. The case would be different, of course, if the model picture were taken for another type of account and without his consent were used picturing him as a victim of venereal disease. Another illustration is the case of a tavernkeeper near the campus of a large university, who requested that whenever possible his name be used in a gossip column of the university daily newspaper so that his place of business would be publicized as a "hang-out" for campus celebrities. Suppose that stories were used in which the inferences were that the particular tavern were a place where drunks congregated and that some students indulged in minor gambling. As a result his place of business acquired an unsavory reputation. If the tavernkeeper sued for libel, his case would be weak for the reason that he knew what kind of activities went on in his tavern and had in fact sought publicity with the mistaken thought that his business volume would be enhanced.

Another bar to an action for libel is an accord and satisfaction. If a person were libeled and the complainant entered into an agreement with the publisher that a sum would be paid in settlement of the claim, the person afterward could not succeed in a libel action for the same offense. Likewise, if the person libeled gave a legal release of his right of action against another, he is barred from pursuing his action for defamation. In a criminal libel case, however, an agreement between the person injured and the publisher, to drop the prosecution, is illegal and void.

§ 51. PARTIES TO AN ACTION

Person or corporation injured may sue for libel; any principal party responsible for the injury may be sued.

Any person of age whose reputation has suffered legal injury may be the plaintiff to an action for libel. If a person is under age, the action for redress may be by the guardian of the minor. If the person libeled dies before civil action for libel is brought and a trial concluded, there is no survivorship of the injury, for a person's reputation dies with him.

However, in defaming a dead person, it is possible that a third person also would be defamed in which case the third person may recover upon satisfactorily establishing his case. Relatives or friends, not themselves defamed, may not recover for a libel of a deceased person.[1]

When individuals are associated in a partnership and the partnership's reputation is injured, it is generally held that the partnership may sue for damages.[2] A corporation may become a plaintiff in an action for libel when its reputation for using honorable business methods is infringed, when its credit standing is affected, or when it is charged with fraud or mismanagement.[3]

The right of a corporation to sue for libel was well explained in Reporters' Assn. v. Sun Printing & Publishing Assn.[4] as follows:

> That a corporation has the right to maintain an action of libel when the publication assails its management, or credit, and inflicts injury upon its business, or property, is a proposition, which is true upon principle and which has the support of authority.

Any person or corporation which takes an active part in the composition and dissemination of a defamatory statement may be sued for libel. As pointed out in the Chapter on Libel, liability for civil libel does not depend upon intent. The publisher as an individual, the corporation owning the publication, and the editorial director, as well as the reporter who takes an active part in the preparation of a defamatory story, are all liable for damages. As a rule the suit would likely be brought against the publishing corporation. Newsboys, linotype operators, and pressmen who may actually help in the distribution of the libelous papers are considered more in the nature of innocent agents, and are not held for libel unless they knowingly participated in publishing and dissemination of the defamation.

[1] Wellman v. Sun Printing & Publishing Ass'n, 66 Hun 331, 21 N.Y.S. 577, 50 N.Y.St.Rep. 254 (1892); Bradt v. New Nonpareil Co., 108 Iowa 449, 79 N.W. 122, 45 L.R.A. 681 (1889).

[2] Constitution Pub. Co. v. Way, 94 Ga. 120, 21 S.E. 139 (1894).

[3] Axton-Fisher Tobacco Co. v. Evening Post Co., 169 Ky. 64, 183 S.W. 269, L.R.A.1916E, 667, Ann.Cas.1918B, 560 (1916); Security Benefit Ass'n v. Daily News Co., C.C.A.Neb., 299 F. 445 (1924).

[4] Reporters' Ass'n v. Sun Printing & Pub. Ass'n, 186 N.Y. 437, 440, 441, 79 N.E. 710, 711 (1906); Gross Coal Co. v. Rose, 126 Wis. 24, 105 N.W. 225, 2 L.R.A.,N.S., 741, 110 Am.St. Rep. 894 (1905).

A person libeled by a corporate defendant is authorized to commence action in any county where the publication is made, or in which the newspaper containing the defamation is circulated.[5]

In a libel against a corporation it may happen that certain officers of the corporation are libeled also, and of course each could bring a separate action for the damage to their reputations as individuals. A charitable corporation, as distinguished from a private corporation for profit, may also be libeled. A municipal corporation may not bring an action for libel because the very nature of a municipal corporation demands a free discussion of its affairs. Chief Justice Thompson of the Illinois Supreme Court, in his opinion in City of Chicago v. Chicago Tribune,[6] held that a citizen has an absolute right to criticize the conduct of the government.

§ 52. NECESSARY ALLEGATIONS

In a civil libel action it is necessary that publication of a defamatory statement be made concerning the plaintiff.

To succeed in a civil action for libel, the plaintiff must establish:

1. That the statement was published.
2. That the statement was made of and concerning the plaintiff.
3. That the statement was defamatory.
4. That, if the words are not libelous in themselves, they are libelous in special circumstances, or resulted in pecuniary damage to the plaintiff.

It is not necessary to allege malice in the case of words libelous *per se,* for upon proof of the publication of a story defamatory upon its face malice is presumed. To overcome a plea in defense on the ground of qualified privilege or fair comment, it is necessary that malice in fact be established.

In criminal libel the allegations include those necessary for libel *per se* that is, publication, identification, and defamation, in addition to an allegation of malice. While in civil libel there need be no allegation of malice, such an allegation is clearly necessary in a prosecution for criminal libel, although it must be

[5] Cook v. Globe Printing Co., 227 Mo. 271, 127 S.W. 332 (1910).

[6] 307 Ill. 595, 139 N.E. 86, 28 A.L.R. 1368 (1923).

admitted that even here the question of malice is confusing and somewhat of a bugaboo. The malice need not be actual ill will or hatred, but might be such a careless disregard of the rights of others that malice will be presumed. If there is actual malice or malice in fact, this should be alleged.

In slander of title or trade libel, as pointed out in the Chapter on Libel to Property, the necessary allegations which must be established by a preponderance of the evidence if the plaintiff is to succeed are publication, identification, falsity, malice, and damage. For actions on the ground of harmful nondefamatory statements, the necessary allegations are publication, untruth, and damage.

The foundation of a libel action is, of course, the injury to the reputation of another. Any printed or written material that causes any appreciable injury to another's reputation is defamatory.[7] Without this essential requirement no action for libel will be successful.

Publication in (civil) libel is the dissemination of defamatory material to one or more persons other than the defamed. Broadly considered, it is the exposure of an infringement of reputation to the public mind. Publication, according to Lord Esher in Pullman v. Hill,[8] is "the making known the defamatory matter after it has been written to some person other than the person of whom it is written. If a statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself." In Staub v. Van Benthuysen[9] the court stated, "publication is the communication of the libel or defamatory matter to a third person. Every one who prints or publishes a libel may be sued by the party defamed, and to such action it is no defence that another wrote it, or that it was printed or published by the desire or procurement of another." Printing and posting or distributing the defamatory material are the first steps in publication, which becomes complete when someone reads the defamation of another.

In criminal libel, however, publication need not be to other than the person defamed. In State v. Avery,[10] the court emphasized that "it is well settled, that the sending of a letter to

[7] Gundram v. Daily News Pub. Co., 175 Iowa 60, 156 N.W. 840 (1916).

[8] (1891) 1 Q.B. 524, 527.

[9] 36 La.Ann. 467, 469 (1884).

[10] 7 Conn. 266, 269, 18 Am.Dec. 105, 106 (1828); but see Rex v. Wegener, 2 Stark. 245 (1817)

the party, filled with abusive language, is an indictable offence, because it tends to a breach of the peace."

If a statement is written by an individual alone and is retained in the possession of the writer, no publication takes place. If such a statement were stolen and then published, without any negligence or carelessness on the part of the writer of the statement, or without any intent on his part, there would be no publication as to him.

Publication is the last act in the conduct of the maker of a defamatory statement by which the libelous words pass beyond his control. "The moment a man delivers a libel from his hands," the court stated in Giles v. State,[11] "his control over it is gone; he has shot his arrow and it does not depend upon him whether it hits the mark or not. There is an end of *locus penitentiae*—his offense is complete—all that depends upon him is consummated; and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act."

Every republication of a libel is in itself a fresh publication. Although a newspaper reprints a story from another newspaper and it later develops that the original story is libelous, the newspaper reprinting the libel is liable for the defamation. As was stated in Diener v. Star Chronicle Pub. Co.,[12] "in libel every tub stands on its own bottom." Each publication of defamatory material constitutes a separate cause of action. In the law "tale bearers are as bad as tale makers."[13] Reports of adjudicated cases are privileged, however.

The publisher of a libelous article would not however be liable for such a republication of the libel in another newspaper provided that as a reasonable man he could not have anticipated such republication.

In Morse v. Times-Republican Co.,[14] the publisher carried a libelous story taken from another publication but added palliative comments; however, it was held that these comments did not negative the republication of the libelous story.

[11] 6 Ga. 276, 282 (1849).

[12] 230 Mo. 613, 132 S.W. 1143, 1147, 33 L.R.A.,N.S., 216 (1910).

[13] Billet v. Times Democrat Pub. Co., 107 La. 751, 32 So. 17, 20, 58 L. R.A. 62 (1902); Harris v. Minvielle, 48 La.Ann. 908, 915, 19 So. 925, 928 (1896); Augusta Chronicle Pub. Co. v. Arrington, 42 Ga.App. 746, 753, 157 S.E. 394, 397 (1931).

[14] 124 Iowa 707, 100 N.W. 867 (1904).

Reference to the plaintiff in the alleged libel must be established if the libel action is to succeed.[15] The plaintiff has the burden to prove that the statement charged to be defamatory referred to him; it is sufficient that the words refer to an ascertainable person, not necessarily to a person specified by name. Lord Mansfield in Rex v. Horne[16] noted: "The gist of every charge of every libel consists in the person or matter of and concerning whom or which the words are averred to be said or written."

While the person libeled must be certainly identified, it is not necessary that every reader of the libel know that the defamatory material referred to a particular individual, for if one or more persons recognize the person's name in the story as referring to a specific individual, identification is sufficient. In special articles, short stories, or novels, a name might be used by a writer in an individual case innocently enough without any intended reference to a known person, but perchance there might be a person of that exact name. In a celebrated case in England, E. Hulton v. Jones,[17] an article was published about a supposedly fictitious individual named, Artemus Jones. Neither the author of the article nor the publisher of the *Sunday Chronicle* in which the article was published knew of the existence of any real person having that name. It happened, nevertheless, that there was a barrister in England named Artemus Jones; in his action against the publishers the barrister recovered. In Corrigan v. Bobbs-Merrill Co.,[18] the name of the plaintiff was inadvertently used and the trial court held that the plaintiff had been libeled, although the court of appeals reversed the case and granted a new trial on the basis of technical error at the trial. In its decision the court of appeals emphasized, "Publishers cannot be so guileless as to be ignorant of the trade risk of injuring others by accidental libels."

When a libelous publication is published against a large group or class of persons, an individual person who is a member of such large group or class may not obtain recovery of damages, for the alleged libel lacks the important element of identification. To libel the Republican party, the Democratic party, or the Catholic church does not mean that every person in such a classifi-

[15] Louisville Times v. Stivers, 252 Ky. 843, 68 S.W.2d 411, 97 A.L.R. 277 (1934).

[16] 2 Cowp. 672, 679 (1777); 98 Eng. Rep. (reprint) 1304.

[17] (1910) A.C. 20, 101 L.T. 831.

[18] 228 N.Y. 58, 126 N.E. 260, 263, 10 A.L.R. 662 (1920).

cation may maintain an action of libel. Although a body or group under particular leadership may commit a censurable act, there is always the likelihood that some individuals of the group or class were in the minority and have opposed the particular act; however, where several individuals are included in a particular libelous publication, the individuals are of course entitled to redress.[19]

In a publication imputing to certain brewers and maltsters in Albany, New York, with certain unwholesome and filthy practices in their manufacturing processes, it was inferred that there were several malthouses on the hill using water from stagnant pools, gutters, and ditches. By a close decision, it was held that there was sufficient identification to permit recovery.[20]

There is sufficient identity if the reference to the plaintiff is through only a close family relationship,[21] so that the injury to reputation of a member of a particular family unit unmistakably refers to one of its members not actually named. The identity may be in reference to a member of a board although no specific member of the board or no director is actually named,[22] to a "city hall ring",[23] or to a radio editor when there are only a few to whom the libel could refer.[24] When the defamatory matter points to no person in particular, it becomes a question of fact for the jury to determine whether there is sufficient identification to constitute actionable libel.[25]

§ 53. COURT AND JURY

Generally, questions of law are for the court; questions of fact for the jury.

The significance of the language itself is in the first instance for the court to determine.[26] When the words used in the alleged defamatory statement are susceptible of two meanings, one innocent and the other damaging, it is within the province of

[19] Ellis v. Kimball, 33 Mass. 132, 16 Pick. 132 (1834).

[20] Ryckman v. Delevan, 25 Wend. 186 (1840).

[21] Fenstermaker v. Tribune Pub. Co., 12 Utah 439, 43 P. 112, 35 L.R.A. 611 (1895).

[22] Children v. Shinn, 168 Iowa 531, 150 N.W. 864 (1915).

[23] Petsch v. St. Paul Dispatch Printing Co., 40 Minn. 291, 41 N.W. 1034 (1889).

[24] Gross v. Cantor, 270 N.Y. 93, 200 N.E. 592 (1936).

[25] Kenworthy v. Journal Co., 117 Mo.App. 327, 93 S.W. 882 (1906).

[26] Maher v. Devlin, 203 Cal. 270, 263 P. 812 (1928).

the jury to decide in what sense the words were read and understood. The court's function is to rule on the capacity of the words used to do damage, the jury's function to decide whether in a particular instance the words used as alleged in a statement not definitely libelous *per se* are applicable in a defamatory sense to the plaintiff.

A libelous statement *per se* in headline or article is sufficient for victory for the party damaged; however, in case of an alleged libelous statement the language should be regarded as a whole.

Both court and jury in their construction or interpretation of the alleged libelous statement should give the language its common and ordinary meaning. The test is, according to Peck v. Coos Bay Times Pub. Co.:[27]

> What sense will be given to them by a reader of ordinary intelligence? Will the natural and proximate consequence be to injure the person about whom they have been published? Will such words tend to bring a person into public hatred, contempt or ridicule? If the words are plain and unambiguous and susceptible of but one meaning, it is the duty of the court to determine from the face of the writing, without reference to innuendo, whether the same are actionable *per se*. If the article is not of such nature and character that the court can say as a matter of law that damages will be presumed as a consequence of its publication, then it cannot be made so by innuendo.

Although in the administration of justice the court in a case before a jury determines the law and the jury determines the fact, the procedure is not always on such a basis in the trial of a libel suit. Because of the woes experienced by writers during the fight for freedom of the press, statutes passed by a number of states permit the jury to determine both the law and the fact in libel cases. Such a provision does not mean that the jury decides all questions of procedure, such as the granting or denial of motions, the acceptance of evidence that may be contrary to established, accepted rules of evidence, ruling on demurrers, and the giving of instructions. In states where the jury is permitted to determine both the law and the fact, the instructions of the judge as to the defamation are advisory only.

In principle, where the court determines what law applies and the jury determines the facts of the particular case, the court

[27] 122 Or. 408, 418, 259 P. 307 (1927).

determines what constitutes publication, whether the libel is clearly libelous *per se,* the significance of unambiguous words, and advises the jury on the principles by which the amount of damages may be reached.

In Commercial Pub. Co. v. Smith,[28] the court stated the following rule on the interpretation of words:

> A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read.

§ 54. BURDEN OF PROOF

Plaintiff has burden of proving publication in first instance and the *onus* of proving malice when defense is made on ground of qualified privilege or fair comment.

The *onus* of proving libel lies upon the plaintiff, in accordance with the accepted principle of the law of evidence that the burden of proof is upon him who affirmatively asserts.[29] In the case of words libelous *per se,* this burden upon the plaintiff means only that the plaintiff must prove publication of defamatory words concerning himself; malice is presumed.[30]

When the defendant pleads fair comment or qualified privilege,[31] the plaintiff may overcome these defenses by showing that the defendant had actual malice in making the publication; the

[28] Commercial Pub. Co. v. Smith, C.C.A.Tenn., 149 F. 704, 706 (1907).

[29] Holmes v. Clisby, 121 Ga. 241, 48 S.E. 934, 104 Am.St.Rep. 103 (1904); Warren v. Hill, Tex.Civ.App., 77 S.W.2d 322 (1935).

[30] Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911): Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal. 284, 38 P. 903, 45 Am.St.Rep. 40 (1894).

[31] Commercial Tribune Pub. Co. v. Haines, 228 Ky. 483, 15 S.W.2d 306 (1929); Stevenson v. Morris, 288 Pa. 405, 136 A. 234, 50 A.L.R. 335 (1927); Naihaus v. Louisiana Weekly Pub. Co., 176 La. 240, 145 So. 527 (1932).

burden is then upon the plaintiff to establish malice. When, however, the defense is absolute privilege and it is shown that such absolute privilege exists, even proof of malice by the plaintiff would not succeed, for absolute privilege is a complete defense.

If the defense is truth or justification, the burden lies upon the defendant to prove the truth of the alleged libel.[32] In certain jurisdictions, however, truth alone is not a defense unless it is published with good motives and for justifiable ends; in such jurisdictions where this rule is based upon statutory enactment, the defendant has the additional burden of proving his good motives and purpose in publishing the article. If a newspaper is able to establish the truth of the article as published and to show that it is a matter of public concern or newsworthy, it would seem that the requirement for establishing good motives and justifiable ends would be satisfied.

While the burden of proving the case in the first instance is upon the plaintiff, the burden of proceeding with the evidence may shift. In this respect the question of burden of proof is understood in two different categories. The general theory of evidence is that the plaintiff must prove his case by a preponderance of the evidence, but when the defendant pleads justification, privilege, right of fair comment, or such circumstances as might mitigate the damage, the burden of proving what he asserts lies upon him, that is, the defendant.

To understand the effect of burden of proof, it must be realized that the plaintiff having the burden of proof and failing to sustain his contentions would lose the case, even though the defendant offer no evidence whatsoever. When the burden lies upon the defendant, the case will fail for the defendant if he fails to sustain his particular defense, provided of course that the plaintiff has proved publication with malice presumed.

The burden of proof in proving negligence or carelessness of the employees of a newspaper or other publication is on the plaintiff.[33] The want of care in selecting reporters, copyreaders, and editors, or the retention of inefficient employees after their incompetence is known to the editor-in-chief, managing editor, or publisher may be shown to increase the damages.

[32] Coffman v. Spokane Chronicle Pub. Co., 65 Wash. 1, 117 P. 596, Ann. Cas.1913B, 636 (1911).

[33] Scripps v. Reilly, 38 Mich. 10 (1878).

§ 55. PROOF OF MALICE

Malice in law is presumed, but malice in fact must be established by evidence.

To recover for libel, it is not necessary to prove malice inasmuch as proof of publication of an article infringing the right to reputation presumes malice, that is, malice in law.[34] Malice in fact, meaning either ill will or such carelessness of statement that any reasonable man would know the injurious or defamatory effect of the words used, need not be present. The libelous words may be used accidently without any trace of ill will, desire to injure, or gross negligence in publication. A newspaper may easily use a word in the headline of a story of doubtful implication, a word that would remove all doubt regarding the defamatory effect of the story, or may use such a word that would be libelous in meaning in relation to either innocent or defamatory words used in the article itself. In such a case, of course, proof of publication would be sufficient to establish the tortious injury or infringement to the right of reputation.

The philosophy of the rule, that in a libel the publication is legally presumed to be maliciously made is clearly pointed out by the court in Wilson v. Fitch,[35] as follows:

> It is easy for the publisher to show the circumstances under which the publication was made, the sources of his information, and the motives for the publication, and thus to rebut the presumption of malice.

Malice in law results from the use of any word actionable in itself. Any libel *per se* presumably is malicious. A libel *per se,* it will be recalled, is one defamatory on its face, one from which damage naturally and probably results, and one which needs no proof of intrinsic meaning or extraneous circumstances.[36]

If the natural inference of the words used in the alleged libel is that they are aimed at the reputation, malice is implied, but if such an inference does not flow naturally from the words themselves, actual malice should be produced when punitive damages are sought.[37]

[34] Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911).

[35] Wilson v. Fitch, 41 Cal. 363, 383 (1871).

[36] Johnson v. Finance Acceptance Co. of Georgia, 118 Fla. 397, 159 So. 364 (1935).

[37] Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662 (1920).

Under the rules of the common law, notice of a defense of justification and failure to sustain such defense is regarded as evidence of malice.[38]

When the defendant pleads either qualified privilege or fair comment as a defense, the plaintiff may overcome such defense by establishing that the alleged defamatory article was in fact malicious.[39] If malice in fact is proved, the jury may award punitive or vindictive damages, in addition to compensatory damages, and if special damage is done, special damages.

Proof of malice may be either intrinsic or extrinsic. Intrinsic proof consists of proof of the viciousness of the words themselves, the time and nature of the publication of the words, repetition of the libel, or the breadth of distribution of the libel. Extrinsic evidence in a libel case consists of proof of circumstances other than those involved in the actual publication of the libelous words themselves; this may be proof of former difficulties between the plaintiff and the defendant, other circumstances such as rivalry in social, business or professional life, former suits between the parties, threats, or personal ill will.

§ 56. DAMAGES AN AWARD FOR INJURY

General damages presumed upon proof of publication; special damages must be averred and proved.

Damages are a judicial award to compensate, and in some cases to penalize, for a legally determined civil injury or infraction of some right. General damages are presumed; special damages must be averred and proved. When the damage or legal injury is slight or nil or when there has been some invasion of a right but slight injury, nominal damages are frequently granted. When the legal injury has resulted from malice or from flagrant disregard of the consequences which might naturally and reasonably be anticipated as the result of an act, punitive or vindictive damages may under common law rules be awarded.

The amount of damages awarded for trespass by defamation varies of course with the injury and with the proof sustained regarding the injury. As already pointed out, proof of publication of the libelous statement is sufficient ground for the jury to

[38] Jastrzembski v. Marxhausen, 120 Mich. 677, 79 N.W. 935 (1899).

[39] Commercial Tribune Pub. Co. v. Haines, 228 Ky. 483, 15 S.W.2d 306 (1929).

award general damages which are presumed from the injurious article.

In Washington Post v. Chaloner,[40] the court stated:

> Where words are published of the plaintiff which constituted a libel, which charge him with having committed a crime, for instance, * * * the law presumes that the plaintiff has been damaged, without proof of any special damage, because the law takes notice of the fact that a libel travels, and it comes to a great many different readers, and that it would be impossible for a plaintiff to trace out the circulation of the libel, and show by whom it had been read, and how it had affected their opinion of him, and all that; so that the jury are justified in allowing substantial damages to a plaintiff against whom a libel has been published, without proof of any particular or substantial damage to him.

In cases of special damages, there must be proof of actual pecuniary loss. In civil libel general compensatory damages, punitive damages, if there is malice or gross disregard of other's rights, and special damages may be awarded. In trade libel only special damages, and, in case of malice or utter disregard of the effect of the damaging statement, punitive damages in addition may be given.

In one case before the circuit court in Cook County, Illinois, the plaintiff sued for $1,500,000 injury allegedly caused by the publication of a story that he was a financial racketeer. The defense won this case, and there was no appeal. When Henry Ford sued the Chicago Tribune for damages on the ground of being called an anarchist, he won a verdict of six cents only.

In Richardson v. Public Ledger Co.,[41] the defendant published an article imputing improper management and unsanitary conditions in a children's home and nursery, which had been founded by the plaintiff. It happened however that for the period covered in part at least by the story, the plaintiff had not been in charge of the institution. In her suit for libel, the plaintiff won a judgment for $15,000 which was affirmed by the higher court. Although the plaintiff in Arizona Pub. Co. v. Harris [42] asked $5,000 actual and $5,000 punitive damages, the trial court allowed a total of $6,000 damages for the publication of a story regarding the demanded resignation of the adjutant general of the state on the ground of certain seditious reports. The supreme court in affirming the judgment below held that the damages were not excessive

[40] 250 U.S. 290, 292, 39 S.Ct. 448, 63 L.Ed. 987 (1919).

[41] 260 Pa. 602, 103 A. 955 (1918).

[42] 20 Ariz. 446, 181 P. 373 (1919).

in light of the character of the plaintiff, the office he held, the circulation of the paper in which the story was published, the treasonable nature of the charge, and the fact that the publication was made at a time when the United States and Germany were at war. In Houston Chronicle Pub. Co. v. Quinn,[43] a communication was published by the defendant in which it was charged that one person shot another; damages totaling $5,000 were granted, of which $1,000 was punitive damages. In Cook v. Globe Printing Company,[44] the defendant had published a story charging fraud in campaign contributions; the verdict was $75,000 actual damages and $75,000 punitive damages but the supreme court affirmed the judgment only on the condition that $50,000 would be remitted from both the actual and punitive damages allowed in the trial court.

[43] Tex.Civ.App., 184 S.W. 669 (1916). [44] 227 Mo. 471, 127 S.W. 332 (1910).

CHAPTER 9

JUSTIFICATION AND RETRACTION

Sec.
57. Truth as a Defense.
58. Effect of Retraction.

§ 57. TRUTH AS A DEFENSE

In either civil or criminal libel truth becomes an important element subject to jurisdictional limitations concerning justifiable ends and good motives in publication.

Justification or truth is a plea in which the publication of the allegedly defamatory publication is admitted, but in which the truth is set up to avoid the liability for the alleged libel.[1] In law it is known as a plea in confession and avoidance.

The truth of a defamatory charge was at common law a complete defense in a civil libel action; this is still the law in England. Under Lord Campbell's Act the truth must be published for the public benefit (with good motives and for justifiable ends) to be a complete defense for criminal libel in England.

Truth as a defense in the several states is subject to jurisdictional variations. Upon authority of R. R. Ray in 16 Minnesota Law Review 43 and other research, the status of truth as a defense may be rather clearly outlined and differentiated. If the respective constitutions, statutes, and judicial decisions are duly noted, it would seem that a classification might be established as follows:

Truth alone as a defense in civil libel cases: Alabama, Arkansas, California, Connecticut, Georgia, Iowa, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, New Jersey, New York, North Carolina, Ohio, Oregon, Texas, Washington, and Wisconsin.

Truth as a defense in civil libel when published with good motives for justifiable ends, for good motives, for public information but without malice, or in good faith on a proper occasion and for a justifiable purpose: Delaware, Florida, Illinois, Maine, Massa-

[1] Reese v. Fife, Mo., 279 S.W. 415 (1925).

chusetts, Nebraska, New Hampshire, Pennsylvania, Rhode Island, South Dakota, West Virginia, and Wyoming.

Truth alone as a defense in criminal libel cases: Arkansas, Colorado, Indiana, Missouri, North Carolina, Ohio, and Vermont.

Truth by constitutional provision may be given in evidence in criminal libel cases: Alabama, Connecticut, Georgia, Kentucky, and Maryland.

Truth as a defense in criminal libel cases when published with good motives for justifiable ends: Arizona, California, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

For the exact status of the truth as a defense, reference should be made to the state constitutions and the annotated statutes of the several states.

In the District of Columbia truth must be published with good motives and for justifiable ends in both civil and criminal libel.

In New Hampshire there is no constitutional or statutory provision in regard to the defense of truth so far as criminal libel is concerned. The common law doctrine of publication with good faith is upheld as the requirement of truth as a defense in civil libel.

When a state constitution declares that truth is a defense in an action for defamation when published with good motives and for justifiable ends, the question arises whether such a plea or answer to the complaint is required to be alleged. In other words, notwithstanding the constitutional provision, is not truth alone sufficient?

When this point has been before higher courts in numerous cases the decision seems to be steadfast in maintaining that the provision means exactly what it specifies, that is, the truth shall be a defense when published with good motives and for justifiable ends. It was held in Wertz v. Sprecher [2] that under the Nebraska constitution of that period with the good motives and justifiable end provisions truth alone would not be a complete defense in a civil action for libel and that if the defendant at-

[2] 82 Neb. 834, 118 N.W. 1071, 17 Ann.Cas. 758 (1908).

tempts to justify he must further allege and prove that he published the alleged defamatory material with good motives and justifiable ends. Tilton v. Maley[3] is authority for a contrary holding, but the effect of this Illinois appellate case seems to be set aside by an Illinois Supreme Court ruling in Ogren v. Rockford Star Printing Co.,[4] which interpreted the Illinois constitutional provision regarding truth published with good motives and for justifiable ends, Section 4 of Article 2, as follows:

> There is no mistaking the meaning of that section, which is that the truth is a defense in both civil and criminal suits only when published with good motives and for justifiable ends. The above section of the constitution is clear and unequivocal and states a sufficient and definite rule by means of which a defendant may establish a defense to a publication that is libelous in its character. It is, therefore, self-executing and needs no statute to put it into force.

It is recognized in many states however that even the truth may cause an injustice and so in such commonwealths truth is not a defense unless published for justifiable ends, or with good motives and for justifiable ends. In Illinois, for example, truth published with good motives and for justifiable ends is a defense in both civil and criminal libel actions.

The truth needlessly or maliciously published does no social good, but often considerable harm to the individual right to reputation. To state that one *is* a criminal because he had years before served time in prison following his conviction as an embezzler would hardly be true even though the individual had been so convicted and imprisoned. That debt to society had been paid and it is conceivable that the individual had lived a clean, useful life for many years following his incarceration; the criminal charge against him had been absolved. To publish needlessly that because of an early mistake the man is a criminal or to infer that he *is* a criminal would be stretching the truth and might well be libelous, though the newspaper might offer in evidence the record of his earlier offense against society.

If an alleged libelous statement is true and if such statement is published with good motives for justifiable ends, there may still be considerable injury to the individual about whom the statement was made, but it would be *damnum absque injuria,* for there justly should be no compensatory damages to an individual

[3] 186 Ill.App. 307 (1914).

[4] 288 Ill. 405, 123 N.E. 587, 591 (1919).

for injury to his reputation when in fact his record does not merit a good reputation. When a party is guilty of an offense charged in a publication, he cannot come into court as a blameless individual; he cannot recover damages on the basis of a character which he does not possess. The old common law doctrine in criminal libel prevented the truth to be given in evidence, thus giving the basis for the maxim, "the greater the truth the greater the libel." It was believed that it was the duty of one who believed that another had committed a crime to report his belief, and too that even though a libel were true it might even more tend to induce a breach of the peace. This doctrine of "the greater the truth the greater the libel" no longer obtains.

In Castle v. Houston,[5] the court in reviewing the question of truth as a defense in criminal cases stated:

> It was at one time the rule of the common law, that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth the greater the libel." This doctrine was based upon the theory, that where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew, to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party grieved ought to complain for an injury to the settled course of law; and to neglect his duty, and publish the offense to the world, thereby bringing the party published into disgrace or ridicule, without an opportunity to show by the judgment of a court that he was innocent, was libelous; and if the matter charged was in fact true, (thereby insuring social ostracism), the injury caused by the publication was much greater than where the publication was false. A false publication it was contended could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom. That this was the true rule of the common law has been denied by many of the ablest jurists in both England and America, who maintained that the liberty of the press consisted in the right to publish with impunity, truth, with good motives and for justifiable ends, whether it respected government, magistracy, or individuals. It certainly was derived from the polluted source of the star-chamber, and was considered at the time an innovation, but like some other precedents, although arbi-

[5] 19 Kan. 417, 420, 421, 27 Am.Rep. 127 (1877).

> trarily and unjustly established, it came to be followed generally by the courts, and sustained as the law of the land. In 1804, in the state of New York, this principle of law was recognized and asserted in the case of the People v. Croswell.

The exact truth of the alleged libel must be proved if the plea of justification is to succeed.[6] To establish a defense of justification, it is necessary then that the defendant publisher prove the actual imputation, or the precise charge particularly in so far as the material of the libelous statement is concerned. Difference in small detail as between the published statement and the proof of justification, so long as the materiality of the statement is not affected, will not defeat this defense.

If a newspaper reporter covering a meeting writes a story published in his newspaper stating that A called X a thief, it is not sufficient for the defendant to prove that A made that statement; the newspaper must prove in fact that X is a thief; unless the newspaper defends successfully on the ground of privilege or fair comment, it would be liable in damages. Neither is it sufficient to prove that according to common rumor X is a thief; the belief of the newspaper in the criminality of X makes no difference whatsoever. If the newspaper stated that B murdered Y, it is not sufficient to prove that B had murdered Z.

If a newspaper stated that A stole a truck and several crates of furniture from B, it would not be justification to prove that A had stolen a secondhand car and three suits of clothes.

In proving justification in a story on an extradition case, for example, it is not necessary to prove the truth of the criminal charge but only the truth of the extradition proceedings.[7]

When a plea of justification is interposed to a libel suit based on the imputation of the commission of a crime, the defense must fasten upon the defendant every legal element of the crime, both as to act and intent. This principle is well illustrated in Schubert v. American Press,[8] which concerned the publishing of a story in the *St. Louis Times*. Briefly, the facts are that the Schubert Motor Car Company of St. Louis commenced an action in the United States district court against the Fidelity and Deposit Co.

[6] Pallet v. Sargent, 36 N.H. 496 (1858); Downs v. Hawley, 112 Mass. 237 (1873); Sun Printing and Publishing Ass'n v. Schenck, C.C.A.N.Y., 98 F. 925 (1900); Rhynas v. Adkisson, 178 Iowa 287, 159 N.W. 877 (1916).

[7] Thompson v. Globe Newspaper Co., 279 Mass. 176, 181 N.E. 249 (1932).

[8] 323 Mo. 299, 19 S.W.2d 472 (1929).

of Maryland, by filing a petition. Before any action had been taken by the court with reference to the petition, the *Times* published the following story:

> **Bonding Company Sued by Schubert Motor Co.**
>
> Suit to force the payment of a $10,000 bond was today filed in the United States District Court against the Fidelity and Deposit Company of Maryland, with headquarters in Baltimore, by the Schubert Motor Car Company, of 1645 South Grand Avenue.
>
> The suit grew out of the alleged defalcation of Lorenz G. Schubert, former president of the Automobile Company, who, it is charged, embezzled $15,488.63 over a period extending from September 8, 1920, to December 12, 1921. The bonding company which was surety for Lorenz for the amount named in the suit, was notified on March 9, 1922, according to the petition, but refused to pay its obligation.

The lower court held for the *Times*, but later granted a new trial; this order was affirmed by the Missouri Supreme Court and the cause remanded. In its opinion, the court made clear the distinction between embezzlement which is a crime, and conversion of funds under circumstances which would not constitute the elements of embezzlement.

It is not necessary, however, in sustaining the truth of a criminal charge, that the evidence of the crime be as meticulous as would be necessary in an indictment for a criminal offense. It is sufficient that the words as published, interpreted in the natural and ordinary sense, fairly import the crime charged.[9]

It has been held in authoritative cases that the defendant will succeed under a plea of justification if he can justify so much of the defamatory charge as constitutes the sting of that charge.

In McAllister v. Detroit Free Press Co.,[10] the court stated that:

> It is unnecessary to repeat and justify every word of the alleged defamatory matter, so long as the substance of the libelous charge be justified. But when the article alleged to be libelous is indivisible, and the facts asserted are dependent on each other to impute the defamatory charge, then each material allegation must be justified, or the plaintiff will be entitled to his damages suffered on account of the portion not justified.

If a full and complete justification of each item making up the libelous charge cannot be made, the facts as they actually exist

[9] Thompson v. Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 A. 556 (1898).

[10] 85 Mich. 453, 461, 48 N.W. 612 (1891).

may be shown in the mitigation of damages. Where essential facts are proved in justification, facts not materially at variance with facts alleged in the statement on which the action was brought will be sufficient to reduce the damages to a minimum.

When one newspaper copies *in part* a libelous story from another publication, the newspaper when sued on the statements made would have to justify only what it actually published. If a libelous statement contains many different charges, so that the general effect is severable, the defendant newspaper may succeed in justifying one or more of the charges, proving truth, fair comment, or mitigation as to the others whenever possible; the justification of one severable charge would be successful so far as that particular substantiation.

Truth in reporting, even though the newspaper's coverage of a court action enjoys qualified privilege, possesses great weight in the determination of liability. Harrison v. Constitution Publishing Co.[11] well illustrates the importance of accurate reporting and presentation of news facts. In this case the *Atlanta Constitution* was sued for libel because of its inaccurate report of a proceeding for the abatement of a nuisance.

Belief in the truth of a defamatory statement made in a publication is not a good defense to an action for libel. If a newspaper upon its investigation believes that an individual is guilty of corrupting public officials and so states in its columns, the newspaper cannot defend on the ground of its belief in the libelous statement, which in fact does not happen to be true. As was stated by the court in Lindsey v. Evening Journal Assn.,[12] if the charges were not true, the defendant could not justify them on the ground that the defendant believed them to be true, and that they were published without malicious intent.

In the authoritative case of Wilson v. Fitch,[13] the sound principle of law was upheld to the effect that belief in a defamatory statement does not constitute justification. In that case, the court stated:

> In order to justify a publication, purporting to be made on the belief of the author that the fact was true, the defendant must prove the truth of the fact, and not merely that he believed it to be true. If one publish of another that he believes

[11] 41 Ga.App. 102, 152 S.E. 131 (1930).

[12] 10 N.J.Misc. 1275, 1282, 163 A. 245, 249 (1932).

[13] Wilson v. Fitch, 41 Cal. 363 (1871).

> he was guilty of murder or arson, it is no justification to prove that he did in good faith believe it, but to make good the justification he must prove that the plaintiff was, in fact, guilty of murder or arson.[14]

In Moore v. Francis,[15] the court held that while the evidence made clear that no actual injury was intended by the defendants, legal excuse was not shown by evidence that the defamatory words were published accidentally or inadvertently, or even with good motives and in honest belief in their truth.

If a defendant can publish that he believed the truth of what is shown to be libelous, he will have established his good faith and his absence of actual malice, thus freeing him from the assessment of punitive damages.[16]

Using the plea of justification, however, on what might be termed a weak case is extremely dangerous. While the truth may be submitted in evidence for the defense, a failure to substantiate the attempted justification may constitute a republication of the libel and become evidence of malice, which would merit at common law the assessment of punitive damages. Thus such republication of the alleged libel serves to aggravate the damages.

The defendant is permitted to prove the circumstances under which the alleged libel was published in order to show probable reason for believing the alleged statement true. If the jury is convinced that the defendant had sound reason to believe the alleged facts of the libel or that the defendant had probable grounds to suspect the plaintiff's guilt and intended to impress the belief of that truth, there may be mitigation of damages even though the truth of the charge may not be established.[17] This practice is permitted "because the damages to be commensurate with the offense should be regulated by the *animus* with which the publication is made and if there be proof that it was done under a belief that it was true—the belief being founded on reasonable grounds—the jury should properly take that into consideration in assessing damages."

It would seem reasonable that, if the good faith of the defendant as shown by his belief in the circumstances around which the

[14] Ibid., 379.

[15] 121 N.Y. 199, 23 N.E. 1127, 8 L.R.A. 214, 18 Am.St.Rep. 810 (1890).

[16] Williams v. Standard-Examiner Pub. Co., 83 Utah 31, 27 P.2d 1 (1933).

[17] Coffin v. Brown, 94 Md. 190, 199, 50 A. 567, 55 L.R.A. 732, 89 Am.St. Rep. 422 (1901).

libelous charge was published should be permitted in mitigation of damages, the failure to establish the plea of justification should weigh against the defendant. When a libel is published, the public may believe, on serious consideration, that the charge may have been a mistake. But when the defendant goes further and asserts that the libelous charge is true, the public naturally would have reason to believe the truth of the charge originally made; in fact, it would be a republication. Then when this defendant fails to show evidence of the truth of his original statements made concerning the plaintiff, it would seem only just that the defendant should bear the responsibility for his insistence in defending a falsehood. However, as was shown in Upton v. Hume,[18] it would not necessarily indicate malice if the defendant who pleads justification fails to do so; justice would be better served if the motive and good faith of the defendant were considered. Although justification is not maintained, the facts and circumstances used as evidence in supporting the plea of justification may well be used in the determination of damages. As was stated in the afore-mentioned case, it should be left to the jury to decide from the evidence and the manner and spirit with which the defense is conducted whether the real object of the plea of justification is to defend the action with a reasonable degree of success, or to repeat the defamation.

§ 58. EFFECT OF RETRACTION

A correction and apology serve to mitigate damages and to establish absence of actual malice on the part of the publisher.

An apology and retraction following the publication of an allegedly libelous article serve to place the true situation before the readers and to establish the good faith of the publisher. In this regard a full apology and retraction may be regarded akin to a plea of justification. It is well established that such an apology by the publisher, if made promptly and wholeheartedly, will mitigate damages, or tend to neutralize the legal injury of the first article.[19] Authoritative cases over a long period of years however do not regard that an injury to reputation will be repaired by a retraction for the reason that many who might read the original story may not see the retraction.[20] The jury

[18] 24 Or. 420, 33 P. 810, 21 L.R.A. 493, 41 Am.St.Rep. 863 (1893).

[19] James v. Powell, 154 Va. 96, 152 S.E. 539 (1930).

[20] Perret v. New Orleans Times Newspaper, 25 La.Ann. 170 (1873).

is entitled to give consideration to both the original and the subsequent article in their determination of the net damage the plaintiff has suffered.[21]

There appeared in the *Chicago Times* for Sept. 8, 1868 the following news story:

Over-Drinking

James Wallace, a blacksmith by trade, forty years of age, but of late a saloon keeper at No. 133 Canal Street, died suddenly at his saloon, in a fit, on Saturday, while sitting at breakfast. Wallace had formerly lived with his wife and family at Muskegon, Mich. In 1861 he enlisted, and was absent three years. On his return he was astounded to find an infant child in his wife's arms—progeny which he could not father. He left his wife, and has since that time drank very hard. At the time of his death he had been on a spree of a week's duration. An inquest was held yesterday at the saloon, and a verdict of "died while in a fit of over-drinking."

Mrs. Wallace made a personal complaint to the *Times'* staff and forthwith the following retraction was published in the *Sunday Times:*

An item was inserted in the "Times" a few days ago, which did great injustice to a worthy, hard working woman. At the inquest on the body of James Wallace, who died from the effects of intemperance, it was stated that the deceased had left his wife for the reason that he had come home from the army, after a three years' absence, and found a three months' old baby in her arms. Mrs. Wallace has evidence, in the form of an affidavit from her attending physician, Dr. S. W. Leonard, of Muskegon, Mich., that her husband was at home at the proper time, previous to the child's birth, and that she has the reputation of being an exemplary, hard working woman. The slur upon her character was, therefore, an unjust and unfounded one, for which the witness who uttered it was responsible.

Despite the foregoing retraction, the court affirmed the trial court's judgment for the plaintiff and held that the retraction could not be regarded as an accord and satisfaction.[22]

In Tresca v. Maddox,[23] the effect of a retraction was well stated. The facts in this case show that the captain of a sailing vessel engaged in coastwise trade was arrested in New Or-

[21] Webb v. Call Pub. Co., 173 Wis. 45, 180 N.W. 263, 13 A.L.R. 790 (1920).

[22] Storey v. Wallace, 60 Ill. 51 (1871).

[23] Tresca v. Maddox, 11 La.Ann. 206, 66 Am.Dec. 198 (1856).

leans in July, 1852, and confined in jail upon the authority of an affidavit made by a policeman in a local court. This affidavit stated that the affiant had been informed and in fact believed that Captain Tresca and others aboard his schooner, the George Lincoln, were guilty of robbing dead bodies of persons killed in an explosion and found floating in the water.

Upon the basis of this affidavit, an employee of the *Crescent,* a newspaper published by the defendant, prepared an article published in that newspaper. The article, exaggerated and inflammatory in its nature, constituted the libel in question.

Proclaiming the guilt of the plaintiff, Captain Tresca, the article went far beyond the statement made in the affidavit and treated his character as that of a noted criminal. It mentioned his "suspicious-looking schooner known to be manned by some nurslings of crime long marked by officers of the law," and the captain himself as a man whom the police, "had known through long years for his piratical inclinings," and noted further that "a land and water rat was this skipper of the schooner, and a pet of criminal justice during many a day." Both captain and crew unmistakably identified were said to have sailed into port, "flushed with successful booty, and bold through previous immunity," only to be arrested by vigilant police. The plaintiff was "a brawny, thick-set, low-browed bandit, and to all appearances, as mild a mannered man as ever scuttled ship or cut a throat."

Naturally the article created a sensation, although investigation showed that it was unjustifiable and mostly falsehood. Upon the preliminary examination there was no evidence to criminate Captain Tresca; the *Crescent* in subsequent articles showed his reputation to be that of an honest and inoffensive citizen. In the defendant's answer the publication of the original article was admitted and its falsity recognized. It was averred that there was no malice in the publication of the article, that the information came through the usual channel of such information, the Recorder's Court, that upon discovery of the error retraction had been made, and that the petitioner, Captain Tresca, had confessed himself satisfied with the *amende.*

In upholding the judgment of the lower court for the plaintiff, the court stated:

> As a chronicler of events that actually occurred, the defendant had a right to report the fact that the plaintiff had been arrested and held for examination on a particular charge. But

he had no right to go beyond this, assume the guilt of the plaintiff upon an *ex parte* charge, heap accusations of other crimes upon his head without any foundation, and vilify his character before the public, except upon the responsibility of proving the truth of his accusations when sued for libel. The tenor of the article in this case was to charge the plaintiff with the high crime of piracy.[24]

In Davis v. Marxhausen,[25] the basis of the suit was the following story:

The police detectives, Noble and McDonald yesterday arrested Michael Davis, who resides at number 311 East Columbia Street, and Charles Davis, living at number 441 Hastings Street, on account of larceny of a quantity of lead pipe belonging to the company who are about to bring natural gas to Detroit.

The following correction was run in the next issue:

The Michael Davis who was arrested for the larceny of lead pipe—the item which was published shortly on last Friday—does not live at number 311 Columbia street. The error was caused by a fault in the writing.

About one week later, the plaintiff's attorney wrote a letter to the defendant to the effect that he had been retained to start an action for libel, and that notice was given in accordance with the Michigan libel law (1889). Forthwith the defendant published an additional retraction as follows:

A Mixing Up of Persons

In the number of the Abend Post of Saturday, November 15, there was a small item published, in which it was stated that Michael Davis and another man had been arrested on account of stealing lead pipe, or had stolen some lead pipe, and on that account had been arrested. So far the notice was correct. But the residence of Michael Davis was given at 311 East Columbia street. In this respect it was error. In that house—that is, number 311 East Columbia street—there lives truly a Michael Davis, and a thoroughly honest man, to whom, on account of this error, an unfortunate injury has been done. In last Sunday's paper, scarcely 12 hours after the publication, we corrected the mistake in this erroneous notice, but we do it now in order to do the fullest justice to the man who is injured.

[24] Ibid., 11 La.Ann. 207, 66 Am.Dec. 198.

[25] Davis v. Marxhausen, 103 Mich. 315, 61 N.W. 504 (1894).

Proof was furnished in the trial that the paper was sent only to subscribers, inferring of course that the correction reached the same readers of the papers who might have seen the original story. The court ordered a directed verdict for the plaintiff, but nominal damages only were recovered below; the higher court reversed the decision.

The *Cincinnati Post* published the following telegraph story from its Chicago correspondent as follows:

FALL OF ANNIE OAKLEY

Famous Woman Rifle Shot in the Police Court in Chicago Charged with Robbery by an Old Negro

(By Scripps-McRae Press Association.)

Chicago, Aug. 11.—Annie Oakley, who won the applause of King Edward of England by an exhibition of marksmanship at Buckingham Palace, was a prisoner in the Harrison Street Police Court Monday. She was arrested on complaint of Charles Curtis, who charged her with robbery. She pleaded guilty and was fined $25. According to the police, the woman was addicted to the use of drugs. Annie Oakley formerly was with "Buffalo Bill's" show and commanded the salary of a light opera prima donna, was petted and feted and awarded the honors at meetings of fashionable gun clubs. The woman was arraigned yesterday morning in Justice Caverly's court in the Harrison Street Police Station, and her pitiful condition discovered. She is destitute and was forced to accept shelter from an old colored man named Curtis. It was he who had her arrested. He relented and would not appear in court against her on seeing her shattered condition. Judge Caverly, nevertheless, sent her to the Bridewell for 25 days to be restrained and cared for and treated there.

It was found that this story was incorrect and the next day the *Post* carried a correction as follows:

IMPOSTER

Woman Who Claimed to be Annie Oakley Was Not the Famous Rifle Shot

(By Scripps-McRae Press Association.)

Chicago, Aug. 12.—The real Annie Oakley, the police have learned, was not a prisoner at the Harrison Street Station on Monday. The woman, who posed as the expert riflle shot, is declared to be an imposter. Annie Oakley in private life is Mrs. Frank Butler; and she is living peacefully in Nut-

ley, N. J. The prisoner sent to the Bridewell claimed to be the daughter-in-law of W. F. Cody ("Buffalo Bill), but Mrs. Butler denied this in a telegram.

The court held for the plaintiff on the ground that no demand for a retraction was made, conceding that the Ohio statute in question was constitutional. Concerning the statute in question, the court stated:

> Not only is a retraction required to put it into operation, but the retraction must be made at the demand of the person libeled. By such demand the injured person waives the remedy he had under the law as it stood, accepts the retraction in lieu of general damages, and consents that he be restricted, in addition to the reparation thus afforded, to a recovery of special damages where he can show actual malice. Under this interpretation he is not deprived of any constitutional right because he consents to the application of the new law to his case. If he does not consent, he still has the remedy under the old law. A man is entitled under the Constitution to a trial by jury, but he may waive it. So he is entitled to a remedy at law for an injury to his reputation, but he may demand and accept a retraction instead. In the case before us no demand for a retraction was made, and no retraction was published, and the statute therefore did not apply.
>
> The second publication may, in a sense, be regarded as a correction, but it was so worded as not to be even that in a satisfactory sense. The statements in the first publication were direct and explicit; those in the second indirect and indefinite. The second does not refer to the first, or assume to withdraw or correct its statements. No apology whatever is made.[26]

Georgia in 1939 passed what was regarded as a model retraction law.[27] The Georgia provision for retraction and limitation of damages was hailed by the press as a model law and some efforts were made to have similar statutes elsewhere. A searching investigation by attorneys for several large newspaper organizations indicated however that the Georgia law might be merely a legal Dr. Jekyll and Mr. Hyde.

In brief, the new Georgia law provides that before a libel action may be brought, the plaintiff must give notice to the publisher, including complete facts as to the statement claimed to be libelous, and his own version of the facts; then if the publisher makes a full and fair retraction, the plaintiff can recover

[26] Post Pub. Co. v. Butler, 137 F. 723, 727, 728 (C.C.A.Ohio 1905).

[27] See Ga.Laws 1939, p. 343.

only the special or actual damages he can sustain in his proof. If the publisher refuses to publish a retraction, it would seem then that the common law rule as to general damages would apply.

The Georgia law is a sensible one, which, if constitutional, would give some protection against the libel racketeer. In some states it would undoubtedly be held constitutional. The proverbial "fly in the ointment" lies in the fact that courts in other states have nullified the effect of such a statute either by declaring such a statute unconstitutional or by so emasculating the statute by interpretation that no advantage has accrued to the press.

Libel statutes of this nature are not new. Michigan passed a retraction statute in 1885, but the statute was declared unconstitutional in Park v. the Detroit Free Press; [28] likewise such a retraction provision was declared unconstitutional by the Supreme Court of Kansas in Hanson v. Krehbiel.[29] Allen v. Pioneer Press,[30] holding a retraction law constitutional, represents the opposite viewpoint. Among other states that have experienced the testing of such a statute are: Alabama, New Jersey, North Carolina, North Dakota, and Ohio. Illinois passed such a statute in 1895, but before it was tested judicially, it was repealed in 1897.

The common law recognizes two classes of damages, general and special. General damages are such as the law presumes must naturally and proximately arise as a result of a libelous publication. Such damages result by inference of law and require no evidence of actual damage. They are designed to be compensatory for a large class of injuries arising from injured feelings, mental anguish, and public humiliation, covering such injury to reputation as contemplated in the Bill of Rights as given in the several state constitutions.

Special damages are recoverable also, under the common law, when the injury can be shown to have caused actual pecuniary loss. In some retraction statutes the term "actual damages" is used. On the interpretation of "actual" rests the leeway for judicial interpretation.

[28] 72 Mich. 560, 40 N.W. 731, 1 L.R.A. 599, 16 Am.St.Rep. 544 (1888).

[29] 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am.St.Rep. 422 (1904).

[30] 40 Minn. 117, 41 N.W. 936, 3 L.R.A. 532, 12 Am.St.Rep. 707 (1889).

It is generally recognized that courts look with disfavor upon slander and libel suits; however, if retraction statutes come before them on a test of constitutionality, there is the likelihood that the courts would strive so to interpret the law as to favor the plaintiff in a particular case. Juries likewise, following the tendency to favor the underdog, would be inclined to favor the person charging defamation over a defendant newspaper published by a substantial corporation.

Even without a retraction statute, as in Illinois, a newspaper in order to show mitigation of damages may plead that the libelous article was published in good faith but under an honest and reasonable mistake of fact, and that a retraction was published following the defamatory publication. Accordingly, in light of the liberal interpretation of such statutory provisions, it would seem that there are few benefits to be gained practically from such legislative regulation.

The basis for unfavorable regard of such retraction provisions is upon these grounds: (a) such a statute deprives the plaintiff of a property right in his good name; (b) it denies him a speedy recovery for an injury to his reputation, a remedy provided by various state constitutions; and (c) it is class legislation in favor of the press.

In regard to objection (a), it was stated in Meyerle v. Pioneer Pub. Co.,[31]

> These damages to a person's reputation * * * are capable of being reduced to money values by reason of the law's presumption that an injury done to a person's feelings, the public shame and disgrace incurred, and the degradation of his reputation are a substantial loss. These damages are in the nature of a property right; they have been said to constitute property.

In regard to objection (b), the court in Hanson v. Krehbiel,[32] for example, pointed out in regard to general damages that,

> The injuries for which this class of damages is allowed are something more than merely speculative. * * * In short, they are such injuries to the reputation as were contemplated in the bill of rights. * * *

Regarding objection (c), Park v. Detroit Free Press [33] stated:

[31] 45 N.D. 568, 574, 178 N.W. 792 (1920).

[32] 68 Kan. 670, 673, 75 P. 1041, 64 L.R.A. 790, 104 Am.St.Rep. 422 (1904).

[33] 72 Mich. 560, 567, 40 N.W. 731, 734, 1 L.R.A. 599, 16 Am.St.Rep. 544 (1888).

> It is not competent for the legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others.

In discussing retraction statutes, the *Harvard Law Review* [34] points out:

> When such laws are made applicable only to newspapers the objection has been raised that they are discriminatory, but they have been upheld as having a sufficiently broad basis, and a reasonable relation to a legitimate object. * * * It is no innovation to restrict recovery to actual damages, where good faith is shown.

Any one of these objections does not prevent some courts from upholding the constitutionality of retraction statutes, as may be noted in the reasoning of Allen v. Pioneer Press; [35] neither do these objections hinder the courts in making such interpretations as will circumvent the evident intention of the drafters of such laws to eliminate general damages, for which no special or pecuniary injury need be proved. Some illustrations of such judicial action will indicate the possible fruitlessness of tinkering with the principles of the common law so well ingrained in the mind of the American judge.

In Comer v. Age Herald Pub. Co.,[36] the Alabama Supreme Court held that there could be no constitutional objection to the elimination of punitive damages, as such damages do not constitute a property right. Similar reasoning was used in the North Carolina case, Osborn v. Leach,[37] and the New Jersey case, Neafie v. Hoboken Printing & Publishing Co.[38]

In Meyerle v. Pioneer Pub. Co.,[39] the North Dakota Supreme Court held a retraction statute constitutional as regards the elimination of punitive damages where no fault is shown on the part of the publisher but seemed to infer that in any event a retraction went only in mitigation of damages. So far as general or special damages are concerned, it would seem that this case merely followed the common law rule.

Under the usual rules of law, in order to prove special damages, it is necessary to establish the fact that actual pecuniary

[31] 43 Harvard Law Review 126, 130 (1929–1930).

[35] 40 Minn. 117, 41 N.W. 936, 3 L. R.A. 532, 12 Am.St.Rep. 707 (1889).

[36] 151 Ala. 613, 44 So. 673, 13 L.R. A.,N S., 525 (1907).

[37] 135 N.C. 628, 47 S.E. 811, 66 L. R.A. 648 (1904).

[38] 75 N.J.L. 564, 68 A. 146 (1907).

[39] 45 N.D. 568, 178 N.W. 792 (1920).

loss resulted. But in Thorson v. Albert Lea Pub. Co.[40] the court considered the following retraction statute:

> In an action for damages for the publication of a libel in a newspaper, the plaintiff shall recover no more than special damages, unless a retraction be demanded and refused, as hereinafter provided. He shall serve upon the publisher at the principal place of publication, a notice, specifying the statements claimed to be libelous, and requesting that the same be withdrawn. And if a retraction thereof be not published in as conspicuous a place and type in said newspaper as were the statements complained of, in a regular issue thereof, published within one week after such service, he may allege such notice, demand, and failure to retract in his complaint, and may recover both special and general damages if his cause of action be maintained. And, if such retraction be so published, he may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith and under a mistake as to the facts. (2 Mason's Minn. St. 1927, § 9397).

Without a demand from the plaintiff the newspaper published an apology and retraction the following day. On the ground of possible negligence the court allowed general damages as given by the trial court for the mental suffering of the plaintiff, despite the fact that a retraction was made and despite the fact that no proof of pecuniary damage was made. This was in a state which has upheld the retraction statute.

In Post Pub. Co. v. Butler,[41] the Ohio Statute on retraction in libel cases was construed by the court to be unconstitutional if it deprived the plaintiff of a property right in his good name, but interpreted the statute as not offending the constitution in fact because a construction was placed upon the statute giving the plaintiff the right to proceed under the old law of libel, or to demand a retraction and abide by the statute.

In conclusion, it may be noted that there is a further objection to such a statute in a time when newspapers are subjected to widespread criticism; the public mind might react unfavorably to legislation which would seem to favor the press. However, so far as the law is concerned, such statutes have been ruled upon both favorably and unfavorably. The Georgia statute in permitting "actual and special damages" leaves plenty of room for interpretation. Fundamentally, the Georgia law seems legally sound, for it has been held that it is within legislative

[40] 190 Minn. 200, 251 N.W. 177, 90 A.L.R. 1169 (1933).

[41] 137 F. 723 (C.C.A.Ohio 1905).

power to change the common law. The danger lies in adverse reaction politically and in wide interpretations by the courts in trying to serve justice under the theory of fundamental principles of the common law, so much controlling in the judicial mind.

CHAPTER 10

PRIVILEGE

Sec.
59. Absolute Privilege.
60. Privilege as a Defense.
61. Privilege in News.
62. Reporting of Pleadings.
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§ 59. ABSOLUTE PRIVILEGE

Protection of absolute privilege gives complete immunization to libel action.

Absolute privilege is the legal immunity granted to persons whatever their remarks or communications upon certain occasions recognized by either the common law or statute, or both.[1] Irrespective of libelous statements, the protection of absolute privilege is complete. No action will lie for any statement made in regularly constituted judicial proceedings by judges, counsel, or witnesses so long as their respective statements are pertinent and material to the case before the court; absolute privilege likewise extends to any statement in Congress or a state legislature by a member thereof, and to any statement in a government official document, or in a military court. How broadly absolute privilege may be used depends upon statutory authority, as for example in declaring that a common council of a municipal corporation, or a public meeting, be a privileged occasion, in which business enacted would be protected even against libelous statements made by accredited members.

1 Hyman v. Press Pub. Co., 199 App.Div. 609, 192 N.Y.S. 47 (1922)— "Absolute privilege relieves a person from liability to pay damages, although the publication may be false, defamatory, and inspired by malice. This freedom from liability is founded upon the principle that it is for the public interest that in certain cases persons should speak or write the whole truth fearlessly, uninfluenced by consideration of consequences. This class of privilege is comparatively a narrow one, and has been strictly confined by the courts to legislative proceedings; judicial proceedings in the established courts, civil or military; official reports and communications by or to the executive head of a department of the government."

The doctrine of absolute privilege was broadened in the significant case of the City of Chicago v. Tribune Co.[2] Normally, in the United States, absolute privilege lends protection to defamatory statements if and when made in the course of legislative meetings and judicial proceedings. It is not in historical background extended either to the private citizen except as he participates as a witness in a trial or unless he is vested with the toga of legislative or judicial office, or becomes an attorney and so an officer of court and then participates in the actual trial of a case. According to Justice Thompson of the Illinois Supreme Court, the citizen is immune from any deleterious effect in criticizing his government; in fact, stated the court, "For the same reason that members of the legislature, judges of the courts and other persons engaged in certain fields of the public service or in the administration of justice are absolutely immune from actions, civil or criminal, for libel for words published in the discharge of such public duties the individual citizen must be given a like privilege when he is acting in his sovereign capacity." [3]

Earlier in the same opinion Justice Thompson stated:

> Every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.

The court maintained that if the action could be maintained against a newspaper it could be maintained against every private citizen who criticized his government; that the fundamental right of freedom of speech is involved, not merely the right of liberty of the press; and that while a person who seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government may be punished, all other utterances or publications against the government must be considered as absolutely privileged.

The complaint of the City of Chicago averred that it had suffered $10,000,000 damages by reason of the fact that competitive bidding of materials used by the city was stifled and that necessity to pay higher prices for its materials resulted, that

[2] 307 Ill. 595, 139 N.E. 86, 28 A.L.R. 1368 (1923).

[3] 307 Ill. 595, 139 N.E. 86, 90, 91, 28 A.L.R. 1368.

its sale of municipal bonds was restricted because of the refusal of persons to place their bids and that consequently there was a smaller amount received from the sale of these securities because of less favorable prices, and that because of injury to its credit the city was unable to transact its business on an economical basis, thereby causing heavy losses.

The complaint stated that at the time it owned property valued at $350,000,000 and that it spends annually $50,000,000 for materials, labor, and supplies; that it purchases each year new property to the value of $7,000,000. The purport of the allegation was that this immense business conducted by the city was hampered and damaged by maliciously published stories, among which were assertions that the city was broke; that its "credit is shot to pieces"; that the administration "is paying city hall debts with city hall script, and we have just begun to feel the effects of being busted"; that Chicago "is hurrying on to bankruptcy and is threatened with a receivership for its revenue"; that the city "is bankrupt and the banks of the city have refused it credit"; that "the city government has run on the rocks"; that "the city cannot pay its debts,—it is bankrupt"; that "it is the issue between this Tammany government, which has bankrupted the treasury of the city of Chicago, which is in default to the city creditors"; that "Chicago is drifting into a receivership."

The *Tribune* articles were published in 1920 at the time of a political campaign for the governorship of Illinois. One of the leading candidates was supported by the *Tribune* and the other by the administration of the city. Speeches of the candidate enjoying *Tribune* support contained many of the alleged damaging statements published in that newspaper.

The city contended that conditional privilege extended only to the publication of the truth with good motives and for justifiable ends and that a city, like any other corporation, may be libeled with respect to its private enterprises.

The decision in reference to the publication of libel denied the city's contention on the ground that a newspaper as well as any individual citizen may freely criticize the government, that there is a fundamental right so to do, and that so far as any libelous publication concerning a municipal corporation, the citizen or the newspaper possesses absolute privilege.

"The American system of government is founded upon the fundamental principle that the citizen is the fountain of all authority," stated the court, which continued:

> It is manifest that the more so-called private property the people permit their governments to own and operate, the more important is the right to freely criticise the administration of the government. As the amount of property owned by the city and the amount of public business to be transacted by the city increase, so does the opportunity for inefficient and corrupt government increase and the greater will be the efforts of the administration to remain in control of such a political prize. The richer the city the greater the incentive to stifle opposition.[4]

This right to criticize the government does not mean however that punishment cannot be made for those who conspire to overthrow the government by force or other illegal means. Two noteworthy Illinois cases, Spies v. People,[5] and People v. Lloyd,[6] give ample authority for this conclusion.

Immunity from liability as to the government is not immunity for a newspaper. At the time of the World War I the *New York World* published what was known as a slacker list, including in error the name of one Charles J. Hyman and the following story:

> The military authorities today, through Maj. Gen. Bullard, commanding the Second Corps area, comprising New York, New Jersey, and Delaware, publish, and The World at the request of the War Department, prints the first installment of what has commonly been referred to as the "slacker list," or roster of deserters, which term is understood to include all men who, having been drafted for military service failed to report to or to entrain for the mobilization camps for training, and thus evaded or did not comply with the Draft Law.
>
> Desertion, under the Articles of War, is a crime, and a deserter is liable to summary arrest by all civilian authorities, Federal, State, or local, and the War Department has stated that its purpose in making these lists public is to bring about the arrest of the persons named therein and their consignment to the military authorities for trial by court martial under military law.
>
> **Official List in New York City**
>
> New York City names "classified and reported by the draft authorities as deserters from the military service of the United States."
>
> Hyman, Charles J., 1134 Lexington avenue; 235 East 80th street; Draft Order Number, 117.

[4] 307 Ill. 595, 609, 610, 139 N.E. 86, 90, 91, 28 A.L.R. 1368 (1923).

[5] 122 Ill. 1, 12 N.E. 865, 17 N.E. 898, 3 Am.St.Rep. 320 (1887).

[6] 304 Ill. 23, 136 N.E. 505 (1922).

The *World* defended upon the ground of absolute privilege on the claim that the list emanated from the War Department and was published at its request, and that the *World* acted therefore in the performance of a public duty, entitling it to the same protection that would attach to the government. The court reversed the holding of the lower court for the defendant on the ground that the privilege, if any, was qualified, rather than absolute and that there was no justification for publishing information that was in fact false.[7]

§ 60. PRIVILEGE AS A DEFENSE

Interests of society under the doctrine of privilege outweigh the infringement of the right to reputation.

Privilege stands as a bulwark for the press in the defense of libel actions. This defense serves to immunize libel. When the privilege is absolute, no libel is actionable; when the privilege is qualified, the privilege protects unless this special immunity is forfeited through abuse. The basic theory of privilege as a defense to libel actions is that the public good justifies the infringement of the right to reputation; it is regarded that the necessity for free discussion warrants under certain circumstances the publishing of libelous statements about individuals or corporations. Occasional injustice is better to be suffered than restriction of speech or press in dealing with topics deemed worthy of such legal protection.

In Post Publishing Company v. Hallam,[8] the court noted:

> The existence and extent of privilege in communications are determined by balancing the needs and good of society with the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed.

"The doctrine of privileged communications rests essentially upon public policy," the court pointed out in Jones v. Express Publishing Company.[9] "Under proper circumstances the interest and necessities of society become paramount to the welfare or reputation of a private individual, and the occasion and cir-

[7] Hyman v. Press Pub. Co., 199 App.Div. 609, 192 N.Y.S. 47 (1922).

[8] C.C.A.Ohio, 59 F. 530, 540 (1893).

[9] 87 Cal.App. 246, 255, 262 P. 78, 83 (1927).

cumstances may for the public good absolve one from punishment for such communications even though they be false."

Qualified privilege is not a right to publish but rather it is the right to be free from legal liability for libel when and if fair, accurate, and nonmalicious reports of judicial, legislative, and other official proceedings are published.

The theory of privilege is based upon the relation of confidence between the parties and upon the greater good that will result from nondisclosure as against disclosure. There is a definite distinction between the occasion that may be regarded in law as privileged and the words or message communicated. An occasion may be privileged for example, but in the specific instance the words communicated may not be privileged because the right of privilege may have been exceeded.

Privilege arises from the necessity that under certain circumstances communications are made on the assumption that they will not be disclosed. The relations between a client and his attorney, for example, are such that their exchange of information is in confidence, such confidence that the law regards so essential that there is an immunity against disclosure provided privilege is not exceeded. Other relations in society that may be commonly regarded as privileged are those of husband and wife, physician and patient, priest and communicant, and reporter and his news source; however, all of these divisions are not recognized as privileged in all the several states.

Communications between a reporter and his news source are privileged by statute in only eleven states, Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Montana, New Jersey, Ohio, and Pennsylvania,[10] according to a survey conducted by Walter A. Steigleman and Frank Thayer in 1942–1943. Georgia provides for privilege on information received

[10] Code of Alabama 1940 Title 7, § 370, General Acts of Alabama 1935, p. 649; Arizona Code Annotated 1939, § 23-103, subd. 7, Laws 1937, ch. 25, § 1, p. 45; Acts of Arkansas 1937, Initiated Act No. 3, § 15, p. 1391, Adopted November 3, 1936; Civil Procedure and Probate Courts of California, Deering, 1941, § 1881, subd. 6, enacted 1935; Laws of State of Indiana 1941, c. 44, Approved Feb. 24, 1941; Kentucky Revised Statutes 1942 421.100, 1936, chap. 29, effective May 16, 1936; Annotated Code of Maryland, Flack, 1939, art. 35, § 2, Approved April 2, 1896; Laws of Montana, 1943, c. 195, p. 368; New Jersey Statutes Annotated, § 2:97–11, 1933, chap. 167, approved May 12, 1933; Ohio General Code 6319-2a, Effective August 14, 1941; and Laws of Pennsylvania 1937, No. 433, Vol. II, p. 2123, Approved June 25, 1937, 28 P.S. § 330.

by a newspaper from an arresting officer or police officials.[11] By strength of judicial decision, it would seem that information received by a newspaper from a news source is privileged in Oklahoma [12] and in Utah.[13]

Words may be privileged despite the fact that the communication may be defamatory in nature; especially is this true in the case of absolute privilege, and may be so in the case of conditional or qualified privilege. Absolute privilege is the immunity given for the protection of legislative discussions and court proceedings. Qualified privilege is conditional upon both the kind of occasion and the absence of malice. This latter type of privilege embraces occasions in which the particular communication is based upon the performance of a duty or the protection of an interest.

The importance of a broad interpretation to the doctrine of privilege was aptly emphasized by John M. Hall, Esq., in the *California Law Review* [14] as follows:

> A newspaper publisher, confronted with the choice of publishing or withholding matters of general interest and concern in his community, may be deterred from publishing such matters by the fear that if a libel action ensues he will have no defense of privilege. In such case liberty of the press would be throttled quite as effectually as it would be by the publisher's fear of losing his printing privileges under some law licensing his newspaper. If it is necessary to progress in a democracy that the press should be jealously guarded against all acts *of the government* which would prevent or limit the free discussion of matters of general interest and concern, it is no less important that such discussion be recognized as qualifiedly privileged in libel actions brought *by individuals.*

The term "privilege" may easily be confused, especially so in the distinction between absolute and qualified or conditional privilege. There is no question that absolute privilege obtains as to members of legislative assemblies, as well as to court sessions either civil or military, when these bodies act in their official

[11] Code of Georgia 1933, § 105-704: "* * * or a truthful report of information received from any arresting officer or police authorities, shall be deemed a privileged communication; and in any action brought for newspaper libel the rule of law as to privileged communications shall apply."

[12] Bodine v. Times Journal Pub. Co., 26 Okl. 135, 110 P. 1096, 31 L.R.A.,N.S., 147 (1910).

[13] Williams v. Standard Examiner Pub. Co., 83 Utah 31, 27 P.2d 1 (1933).

[14] 26 California Law Review #2, p. 227 (1938).

capacity. How much more is included under the absolutely privileged publications is open to question. Reports of proceedings that in themselves would be accorded absolute privilege are at common law generally regarded as conditionally privileged. The report of a trial, statements of witnesses, addresses of counsel, charge and rulings of the court, the jury's verdict, and the court's judgment, decree or sentence, enjoy qualified privilege. Even though the pleas of counsel or the testimony of witnesses contain defamatory material, there would be at common law no legal redress, although the sensible rule is that the statements must be pertinent and material to the trial at hand.

Publishers may rely upon qualified privilege so long as their reports are fair and unbiased, and are founded upon facts. By statute, privilege normally considered qualified under the principles of the common law may be made absolute. The English Law of Libel Amendment Act [15] states that:

> A fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.

It should be noted in the foregoing section from the Law of Libel Amendment Act that the protection exists only for proceedings publicly heard and contemporaneously published. The protection of this statute is accorded to newspapers, it should be observed.

It was formerly a practice in England to prevent the day-to-day accounts of a trial and to permit publication of the proceedings only when the trial had been concluded. The Law of Libel Amendment Act positively gives authority for publication of the proceedings as the trial progresses. To come under the protection of the Law of Libel Amendment Act, the newspaper must come within the definition of such a publication as given in the Newspaper Libel and Registration Act, 1881,[16] a definition adopted in the Law of Libel Amendment Act, 1888. This definition follows:

> The word "Newspaper" shall mean any paper containing public news, intelligence, or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two papers, parts, or numbers.

[15] 51 § 52 Vict.C. 64, sect. 3 (1888). [16] 44 & 45 Vict. c. 60, sec. 1.

> Also any printed paper in order to be dispersed, and made public, weekly, or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.[17]

All publications not coming within the terms of the Newspaper Libel and Registration Act would be entitled to qualified privilege in their publication of court trial proceedings, Parliamentary proceedings, or official government documents.

The question arises whether a libel in a newspaper properly registered in England would be protected by qualified or absolute privilege. Leading authorities hold that the privilege is absolute.[18] Odgers disagrees however, saying that he cannot believe that the intention was to make such reports absolute.[19] If the meaning is "absolute" privilege there could be no action irrespective of the amount of malice with which the particular publication was made. The usual rule is that newspaper reports of judicial and legislative proceedings are protected under qualified privilege, which malice would defeat.

Under the English rule, as established by the Law of Libel Amendment Act, privilege is extended to public meetings; in the United States, on the contrary, public meetings are not even given the protection of qualified privilege.[20]

It is submitted, on the basis of recognized English authorities,[21] that this privilege accorded to newspaper reports of public meetings is qualified. The English Act provides:

> A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, of any meeting of any commissioners authorized to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or

[17] 51 & 52 Vict. c. 64.

[18] Fraser, H., Libel and Slander (7th Ed.) pp. 129ff; Button, W. A., Libel and Slander p. 122, 123; Ball, W. V., Libel and Slander, p. 117.

[19] Odgers, W. B., Libel and Slander (6th ed.), pp. 268–9.

[20] Boehmer v. Detroit Free Press Co., 94 Mich. 7, 53 N.W. 822, 34 Am. St.Rep. 318 (1892).

[21] Fraser, H., Libel and Slander (7th ed.), pp. 129ff; Button W. A., Libel and Slander, p. 122–123; Ball, W. V., Libel and Slander, p. 117.

department, officer of state, commissioner of police, or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter. * * *

For the purposes of this section "public meeting" shall mean any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.[22]

This section provides also that nothing in this section (sec. 4 of the Act) shall be deemed to limit or abridge any privilege existing or to protect any matter that is not one of public concern. This section adopts also the common law rule that malice will defeat the privilege. Thus the protection given the reporting of public meetings in England is definitely more limited than the protection given the reportings of court proceedings, as covered by Sec. 3, of the same Act.

§ 61. PRIVILEGE IN NEWS

Newspaper reports entitled to qualified privilege upon privileged occasions or circumstances only when such privilege is not abused.

News as such is not qualifiedly privileged, but for news to come under the protection of qualified privilege, it must be within the recognized classes of communications entitled thereto. Cooley in his work on Torts[23] makes the statement that "No privilege is accorded to the publication of news." It is submitted that this statement alone is too broad, for surely a story printed about a debate in a state legislature for example would be news, would be printed in the news columns, and would be qualifiedly privileged, provided there were no malice in its publication and the report were fair, unbiased, and founded upon facts.

In an early case, Barnes v. Campbell,[24] cited by Cooley as one of his authorities for the foregoing quotation, the court said:

[22] 51 & 52 Vict. c. 64.

[23] Cooley, T. M., Law of Torts (A. H. Throckmorton Ed.), p. 375.

[24] 59 N.H. 128, 47 Am.Rep. 183 (1879); Smart v. Blanchard, 42 N.H. 137, 151 (1860); Palmer v. Concord, 48 N.H. 211, 216, 97 Am.Dec. 605 (1868).

"Professional publishers of news are not exempt as a privileged class, from the consequences of damage done by their false news. Their communications are not privileged merely because made in a public journal. They have the same rights to give information that others have, and no more."

In Pratt v. Pioneer Press Co.,[25] libel was charged by a physician who was reported in the defendant publication as leaving unburied and unreported a deceased seven months' child; the court's opinion was as follows: "This was no privileged communication. It was published as a matter of news and in the publication of news, or in criticizing men and things, the publisher of a newspaper has no privileges or immunities not possessed by any citizen."

These cases do not import a meaning as broad as that given in the Cooley conclusion. It is true that a newspaper enjoys no privileges not enjoyed by any individual; however, it is true that a newspaper by its very nature possesses opportunities for reporting news not possessed by individuals generally but also carries greater responsibilities because of its increased opportunities in reporting the news.

In McAllister v. Detroit Free Press Co.,[26] it was argued that the newspaper, in this day and age when people are eager for news and almost everyone is a newspaper reader, should be allowed some latitude and more privilege than is ordinarily allowed under the law of libel. The argument proceeded on the theory that because the world is thirsting for news and because the "libel in a newspaper is more far reaching and wide-spread than it used to be when tales were only spread by the mouth, or through the medium of books or letters, there should be given greater immunity to gossip in the newspaper, although the harm to the person injured is infinitely greater than it would be if published otherwise," but the court in its decision did not agree with the argument of the defendant, and stated:

> The greater the circulation the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items. No newspaper has any right to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and fame or business. And the reporter of a newspaper has no more right to collect stories on the street, or even to gather information from policemen or magistrates out of court, about a citizen, and to his

[25] 30 Minn. 41, 44, 14 N.W. 62, 63 (1882).

[26] 76 Mich. 338, 43 N.W. 431, 15 Am.St.Rep. 318 (1889).

> detriment, and publish such stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street.[27]

News that by inference on the part of the reader may be understood as libelous must be interpreted as a whole in order to determine whether the news article is in fact libelous. The *Missourian* published a story stating that one Davis, a city councilman, was paid money from the city's building fund without the approval of the counsel. Davis sued for libel. The evidence indicated that certified public accountants had been employed to audit the books and accounts of the city's water and light department and that they addressed their report to the mayor. While it was stated incorrectly that a check for $403.20 paid to Davis had not been voted approval by the council, there was no imputation directly that Davis was corrupt; rather the meaning of the entire article was that there was a technical irregularity relative to the water and light department and that it would henceforth be necessary for the council formally to appropriate funds instead of giving approval after the completion of a transaction.

The report of the accountants on public business as given to the mayor and as reported in the newspaper was a matter of public interest. The court stated:

> The report thus became a matter of public concern and public interest, a quasi public document so to speak, that gave the defendant the right to communicate it to others, provided defendant fairly and in good faith substantially quoted or epitomized its contents and meaning.[28]

The fundamental legal recognition of privilege in reporting trials is predicated upon the desirability that trials should take place under the public eye. Although the controversies of private citizens as to purely private causes may have little interest for the public, "it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." [29]

[27] 76 Mich. 338, 355, 356, 43 N.W. 431, 437, 15 Am.St.Rep. 318.

[28] Davis v. Missourian Pub. Ass'n, 323 Mo. 695, 703, 19 S.W.2d 650 (1929).

[29] Cowley v. Pulsifer, 137 Mass. 392, 394, 50 Am.Rep. 318 (1884).

Tribunals are part of the orderly system of present day social life, giving access to the settlement of private wrongs of citizens who are excluded from private redress and are compelled to take their legal difficulties before judicial bodies for the enforcement of their legal rights and the defense of unjust claims against them. In light of this system of law and order, the conduct of both judge and jury in reaching their decisions, as well as the decisions themselves, are fitting subjects of fair and accurate reporting. Judges and jurymen are public officers responsible to the people from whom they derive their mandates for the honest and intelligent exercise of their official functions.

Court proceedings constitute legitimate items for the press. While the actual results of private litigation may hold little interest except for the particular parties themselves, the legal principles involved, the definition and interpretation of rights, and the methods of administering justice do concern the community. To restrict within too narrow limits the news stories of litigation and court administration and to prevent fair criticism of litigation and judicial administration would be an offense against the guaranteed freedom of speech and liberty of the press. It is important, inasmuch as all members of the body politic cannot be personally present at the great number of trials, that there be open, public trials. The press provides this extension of the publicity of the courtroom. As was aptly stated in Brown v. Providence Telegram Pub. Co.,[30] "this principle gives neither to a newspaper nor to an individual the right to prejudice a case, or to misstate it, or to hold up to scorn or ridicule, either directly or by a natural implication from his language, a party who is pursuing his legal remedies in court."

That a full, fair, and impartial report of a judicial proceeding is qualifiedly privileged is not questioned.[31] This rule is of universal application in Anglo-American jurisprudence; there are however some special qualifications. Publication of court proceedings without malice was privileged under the common law.[32] In Times-Dispatch Pub. Co. v. Zoll,[33] the court stated:

> The policy of the law which, under certain circumstances, permits newspapers to publish court proceedings finds its justification in its beneficent influence upon those charged with

[30] 25 R.I. 117, 119, 54 A. 1061 (1903).

[31] Lee v. Brooklyn Union Pub. Co., 209 N.Y. 245, 103 N.E. 155 (1913).

[32] Salisbury v. Union & Advertiser Co., 45 Hun 120 (1887).

[33] 148 Va. 850, 858, 139 S.E. 505 (1927).

> the trial and conduct of litigation, when they know their official acts may be bared to public scrutiny and criticism.

In Brown v. Providence Telegram Co.,[34] the court noted that a litigant must submit to a fair and accurate publication of the proceedings of his case but that the newspaper had no right to prejudice a case or to misstate the facts or directly or impliedly to hold up to scorn a party who is pursuing his legal remedies. Any subject which may be considered by a judicial tribunal is privileged, though such proceeding may be preliminary, interlocutory, or, according to general rule, *ex parte*.[35] The hearing before a court may be *in camera,* or in the judge's chambers.[36] The report of any judicial proceeding may be abridged or condensed and, if substantially correct, qualifiedly privileged.[37] The report need not be *verbatim.* If a report of the proceedings is substantially correct, the criminal charge as made by the prosecution may be false and yet the story on the proceedings qualifiedly privileged.[38]

It is established that proceedings before a police magistrate are privileged,[39] as well as grand jury proceedings when given for publication.[40] When a reporter writes up loose statements made by a justice of the peace, statements based on remarks of persons not under oath or in a court proceeding, the newspaper publishing such statements does so at its own risk; if libelous statements are made in such report the newspaper would not be able to defend successfully on the ground of qualified privilege.[41]

Divorce proceedings are ordinarily qualifiedly privileged unless a special statute limits reports of such proceedings, the court rules that no detailed report be made, or the proceedings include obscene material.

[34] 25 R.I. 117, 54 A. 1061 (1903).

[35] Fitch v. Daily News Pub. Co., 116 Neb. 474, 217 N.W. 947, 59 A.L.R. 1056 (1928); Lundin v. Post Pub. Co., 217 Mass. 213, 104 N.E. 480, 52 L.R.A.,N.S., 207 (1914); Metcalf v. Times Pub. Co., 20 R.I. 674, 40 A. 864 (1898); McBee v. Fulton, 47 Md. 403 (1878).

[36] Metcalf v. Times Pub. Co., 20 R.I. 674, 40 A. 864, 78 Am.St.Rep. 900 (1898).

[37] Salisbury v. Union & Advertiser Co., 45 Hun 120 (1887).

[38] D'Auxy v. Star Co., 31 Misc. 388, 64 N.Y.S. 283 (1900).

[39] Bissell v. Press Pub. Co., 62 Hun (N.Y.) 551, 17 N.Y.S. 393 (1891).

[40] Sweet v. Post Pub. Co., 215 Mass. 450, 102 N.E. 660, 47 L.R.A.,N.S., 240, Ann.Cas.1914D, 533 (1913).

[41] McDermott v. Evening Journal Ass'n, 43 N.J.L. 488, 39 Am.Rep. 606 (1881).

In Schaffran v. Press Pub. Co.,[42] a newspaper story on a divorce proceeding was held unfair and therefore not entitled to qualified privilege. The story was as follows:

> Asking no alimony and encountering no opposition, Mme. Bronislawa Lamprecht de Petschenko obtained a divorce decree yesterday in Supreme Court against Conrad Lamprecht.
>
> Justice Townley awarded the decree when she produced testimony that her husband lived during parts of 1925 and 1926 with a woman known as Mrs. Schafran, and that he and an unidentified woman were surprised by a divorce raiding party at No. 27 West 94th Street, Jan. 31, 1927. Mr. Lamprecht was not in court. She was.
>
> Mme. de Petschenko, sometimes known as "Countess de Petschenko" or as "Baroness de Petschenko," was the centre of a society turmoil last December in connection with her promotions of benefits for refugee Russian children in Europe. On December 21 she appeared before the Department of Public Welfare to vindicate herself of scandal in the use of the funds by showing her accounts.
>
> Her activities were investigated and she was given a clean slate.

The danger for newspapers lies particularly in publishing stories on the filing of complaints only. The fact that a divorce complaint has been filed is news and may be used, but the contents of the plaintiff's complaint are not privileged. Barber v. St. Louis Dispatch Co.[43] gives a striking example. The *Dispatch* published the following story:

> **Conjugal Infelicity**
>
> Lewis D. Langley, formerly a resident of the town of Litchfield, Ill., has brought suit for divorce from his wife, Belle Langley, accusing her of having, during the summer of 1871, committed adultery with George Pomeroy, a conductor on the St. Louis & Indianapolis Railroad, at Litchfield, and subsequently with him and divers other men in St. Louis. About a year after his marriage to defendant, which occurred August 28, 1869, a child was born, of which he denies being the father.

It happened as shown at the trial that the contents of the petition had never been brought before the court at any sitting, or with a view to judicial determination. The lower court awarded damages for libel but upon a technical error the case was reversed and remanded for further action, with the higher court stating:

[42] 258 N.Y. 207, 179 N.E. 387 (1932). [43] 3 Mo.App. 377 (1877).

> Where a court or public magistrate is sitting publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is a privileged communication, whether the proceedings are on a trial or on a preliminary and *ex parte* hearing. But the very terms of the rule imply that there must be a hearing of some kind. In order that the *ex parte* nature of the proceeding may not destroy the privilege—to prevent such a result—there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action. * * *
>
> But where a paper is filed by a private person, perhaps not even with intent to produce an investigation, he who chooses to publish it should do so at his own risk. It is better that a craving, often anything but wholesome, should be disappointed, than a reputation assailed. If the charges of the petition are not baseless, they will soon be made the subject of judicial action, in one form or another, and when they are made such, the law, from motives of public policy, makes all proper publications in regard to them privileged communications.[44]

Qualified privilege does not however protect the story written on the basis of testimony at a trial, when such testimony is ordered stricken from the record by the court. If in such a circumstance, the stricken testimony contains material defamatory of a third party and a newspaper publishes the stricken material, on the basis of the court's original record, it would seem that the newspaper so publishing would be liable. If the newspaper obtained the identical material from other sources, there would not be any issue on the question of qualified privilege. Publication of stricken material ordered impounded or suppressed, whether it contained libelous material or not, would subject the paper so publishing to contempt of court on the ground of disobeying the court's orders.

Conditional or qualified privilege may be exceeded by the newspaper, as for example in reporting court proceedings, although no actual malice or ill will motivates the particular publication. When privilege is exceeded, the newspaper would of course be liable for defamation, as is illustrated in the case of Evening News v. Bowie.[45] In that case, a reporter for the *Evening News* prepared a story on a court proceeding, as follows:

> (Special Dispatch to the News)
>
> Annapolis, Oct. 20.—Corruption in official circles of Annapolis and Anne Arundel County was strongly hinted at by Judge Robert Moss of the Circuit Court in his charge to the grand jury this morning. The judge's charge also included a

[44] Ibid., 382–387.

[45] 154 Md. 604, 141 A. 416 (1928).

> stinging rebuke to Sheriff Bowie of the county. After declaring the increase of bootlegging was a disgrace to the county, Judge Moss said a clean up of conditions was in order. He referred to Garfield Chase (colored) who was employed as a stool pigeon by the sheriff's office in running down bootlegs and said repeated attempts to tamper with Chase and make him useless as a state's witness had been made. He blamed Sheriff Bowie for permitting these attempts and intimated that a member of the city police force was responsible for them. The court insisted that Chase be indicted either for bootlegging or for perjury and urged the jury to go to the bottom of the plot to save those against whom Chase was to testify.

It was established by the evidence, however, that the *Evening News* correspondent at Annapolis was not present in the court room when the judge made his charge to the grand jury; rather he merely had heard that the judge had made a charge to the jury and so went to the court room where he interviewed several persons.

It was further established that the reporter did not remember any of the persons from whom he gathered information relative to the story on the court's charge and that he did not verify his story with Judge Moss. He simply took a chance on hearsay, which he thought was reliable. On the contrary, it did not appear in any of the evidence in this case that Judge Moss had blamed the sheriff for the increase of illicit liquor sales in the county, for lax conditions at the county jail, or for permitting inmates at the jail to be influenced or tampered with in what they would claim when they were called as witnesses.

In this case the reporter was negligent and grossly careless in ascertaining his facts and in failing to verify his story with the proper sources. He had no malice in preparing the story apparently but acted wholly upon his desire to turn in a good story. In this connection the court's opinion in Conroy v. Pittsburgh Times [46] is apropos:

> Libelous articles in newspapers seldom spring from any hostility to the individual but usually from a ruthless disregard of personal feelings and private rights, in the mad hunt for news and sensations.

The Standard Publishing Co. successfully defended a suit for libel based on the publication of the following story:

[46] 139 Pa. 334, 339, 21 A. 154, 156, 11 L.R.A. 725, 23 Am.St.Rep. 188 (1891).

Trying to Organize a Boston Company

A circular was received this week by nearly all the fire offices on the street, as well as by a number of business men, purporting to be a sort of prospectus for a new fire insurance company, which one H. W. Conner, of this city, has under contemplation.

About four years ago Mr. Conner represented the St. Paul Fire & Marine as marine agent, and his connection with the fire end of the business has been through a few sub-agencies. It is understood that he proposes to call his company the Indemnity Fire.

With some of the fire companies Mr. Conner is particularly well known, so much so, in fact, that they have refused to again place insurance on his property, which, it is thought, is particularly susceptible to fire.

On December 16, 1895, the summer home of a Harrison W. Conner, at Harwich, Mass., was burned. Again, on July 19, 1897, the place at 9 Hastings Street, this city, said to belong to the same Mr. Conner, suffered a fire, the origin of which was reported by the State fire marshal's office as "incendiary," and the remarks accompanying the official report on this fire, on file at that office, read as follows:

"Am decidedly of the opinion that it was caused by Conner, as this house was unoccupied at the time. I have no doubt there was over insurance to a great extent. Conner is an insurance agent, and has had two previous fires, one in Chelsea, where he had a yacht burned under suspicious circumstances on which he collected insurance, also one at Harwich, which I have no doubt was of incendiary origin. I consider him a dangerous man for fire risk."

At the police inspectors' department there is on file a case also against a Harrison W. Conner, wherein he was arrested on the complaint of Josiah W. Beckford for selling property assigned to him to save it from going into the possession of the assignee. This case however, was *nol prossed.* If this Harrison W. Conner referred to by the fire marshal and the police department is the same one who is endeavoring to organize a new fire insurance company in this city, his efforts will not meet with much success.

The basis of the decision for the defendant was that both the findings of the state fire marshal and the proceedings of the municipal court are privileged.[47]

Reports of *ex parte* proceedings are accorded qualified privilege according to leading authorities, particularly when the proceedings are before a judicial tribunal. The fact that only one

[47] Conner v. Standard Pub. Co., 183 Mass. 474, 475, 67 N.E. 596 (1903).

side of the case is represented makes no difference so far as this defense is concerned. Although ordinarily a fairer report of the merits of a case might be obtained in *inter partes* proceedings, that is, proceedings in which both sides are represented, the best reasoned cases extend privilege to the proceedings themselves, as they are before a judicial tribunal, and likewise a report of what takes place would be regarded as qualifiedly privileged.[48]

Justice of peace courts are considered a part of the judicial system and so are accorded privilege; reports of proceedings before justices of the peace are entitled to qualified privilege.[49] Likewise proceedings before police magistrates are qualifiedly privileged when reported in a newspaper, provided of course that the report is fair, accurate, and impartial.

The Detroit Post & Tribune Company published an unfair report of proceedings before a justice of the peace. The reporter did not wait to give the judicial conclusion to the readers but proceeded to pronounce guilt and to suggest a probable punishment not known to the law. The court in setting aside the judgment for the plaintiff on technical grounds and ordering a new trial stated that the law permitted no privilege for such publication. "To make a judicial investigation," continued the court, "the mere occasion for unfounded sensational charges is not only to do wrong to individuals, but to disturb the peace and order of society, and no public considerations sanction, encourage, or excuse it." [50] The story published was as follows:

> The greatest excitement was caused here to-day by the issuing of a warrant for the arrest of Dr. F. W. Bathrick, a wealthy and leading physician of this city, on the charge of abortion on the person of Miss Anna Prosser, a young lady of seventeen. The facts as embodied in the sworn statement, are these: Miss Anna Prosser is a beautiful young lady, and the only daughter of an English lady. About one year ago she was taken sick, and Dr. Bathrick was called to attend her professionally. During his visits to the house, he managed by various promises of large sums of money, houses, etc., to seduce the young lady, who has always borne a pure and spotless character. After this criminal interviews were frequent,

[48] 3 Restatement of the Law of Torts #611, p. 295; Metcalf v. Times Pub. Co., 20 R.I. 674, 40 A. 864, 78 Am.St.Rep. 900 (1898); Fitch v. Daily News Pub. Co., 116 Neb. 474, 217 N.W. 947, 59 A.L.R. 1056 (1928).

[49] McBee v. Fulton, 47 Md. 403, 28 Am.Rep. 465 (1878); Miner v. Post & Tribune Co., 49 Mich. 358, 13 N.W. 773 (1882); Bissell v. Press Pub. Co., 62 Hun 551, 17 N.Y.S. 393 (1891).

[50] Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629, 16 N.W. 172, 179, 45 Am.Rep. 63 (1883).

until a few weeks ago, when the girl was discovered to be *enceinte,* and to cover up the discovery he produced an abortion, in which operation the girl, who is frail and delicate, nearly died. He never kept his promises to her, and this was the way the matter leaked out, and the officers got hold of it, whereupon they obtained the girl's and the mother's affidavits yesterday, and also the vials containing the medicine he gave her to produce the abortion. Upon this evidence the warrant was issued. There does not appear to be the least doubt of his guilt of the triple crime of seduction, adultery and abortion. The doctor is a married man, and has a large and respectable family of grown up children, and a wife who is nearly heartbroken at this development of her husband's perfidy. So great has been the excitement over the matter on the street, that threats of tar and feathers have been openly made.

The Baltimore *American and Commercial Advertiser* published the following story on the basis of a hearing before a justice of the peace:

For several weeks past the police of the North-western District have been endeavoring to make the arrest of a man named Wm. McBee who has occasioned considerable trouble in various neighborhoods. It appears he is a low character who habitually frequents the streets and always seeks to throw himself in the way of school girls, often insulting them with indecent remarks and actions. In some instances he would wait around the schools until the dismissal of the pupils, and then would exhibit the greatest importunity in pressing his company upon them. This man and his reputation became so extensively known in many of the female schools that he was feared by the scholars, and numerous precautions adopted to protect the girls from his insults.

For several days past he had been visiting the locality of a well known and fashionable school, and created the greatest annoyance to the young ladies by his persistent familiarities and vulgar insults. The police were notified and yesterday succeeded in arresting him.

He was given a hearing in the afternoon, when a number of young ladies who had been approached testified as to the facts as above narrated. Justice McCaffery committed him for the action of the grand jury.

McBee sued for libel but the defendant newspaper won in the trial court and the judgment was affirmed in the Maryland Supreme Court.[51]

[51] McBee v. Fulton, 47 Md. 403, 28 Am.Rep. 465 (1878).

The *New Orleans Item,* on the ground that council proceedings are privileged,[52] won its case when sued for defamation charged to have been made in the following story:

> **Leininger Fines in Public, Frees Notorious Crooks in Private, Say Sleuths**
>
> When the detectives were in the courtroom, Judge Leininger of the first recorder's court, fined three men, John Cassidy, Harry Tobler and Gasper Demaria, $15 or 30 days in jail.
>
> "When we left the court the fines were canceled by Judge Leininger and the men were turned loose," the detectives discovered, according to the report of Safety Commissioner Ray, submitted to the commission council Tuesday. * * *

The New Nonpareil Co. was sued for libel for the publication of the following two stories on successive days:

> **The Neighbors Were Not Able to Sleep**
>
> Hence B. F. Walton and Nellie Flues were arrested. Using too much scattered language, B. F. Walton, alias John Doe, and Nellie Flues were in police court this morning, charged with disturbing the peace at the Walton residence, Twenty-Eighth street and Broadway, late last night. According to neighbors and other inmates of the house, the two were using obscene language and otherwise making the night suitable for anything but sleep. The case was continued until June 25, 1910.
>
> ---
>
> **Laura Walton Asks Divorce**
>
> A petition for a divorce has been filed in the district court by Laura Walton against B. F. Walton. The plaintiff alleges cruel and inhuman treatment, drunkenness, and non-support as grounds for the action. The statement is also made that the defendant has been intimate with a woman named Nellie Flues and that the defendant spends much of his time with her. The plaintiff prays for the custody of the two children born of her marriage with the defendant, and for permanent alimony in the sum of twelve dollars a week.

The judgment for the plaintiff was reversed by the Iowa Supreme Court on the ground that the articles were qualifiedly privileged. The opinion stated:

> The publication of fair and impartial reports of such proceedings is privileged, unless the court where such proceedings are had has prohibited the publication of the same, or the subject matter of the trial is unfit for publication.[53]

[52] Leininger v. New Orleans Item Pub. Co., 156 La. 1044, 101 So. 411 (1924).

[53] Flues v. New Nonpareil Co., 155 Iowa 290, 295, 135 N.W. 1083, 1085, Ann.Cas.1915A, 33 (1912).

The reports of a grand jury are qualifiedly privileged when such reports have been presented to a court for judicial consideration and when such reports are made fairly, impartially, and accurately in a newspaper. Even if the report is later stricken from the court records, a newspaper account of the grand jury proceedings in compliance with the conditions mentioned above are privileged. In Williams v. Journal Co.,[54] the court stated:

> The grand jury's report was a public statement made in a judicial proceeding, and the municipal court permitted it to be filed, * * * and remain on file until it was subsequently ordered stricken after a decision on an appeal to this court. In the meantime it was on record by order of the municipal court as a public statement in a judicial proceeding, which continued from the time of the impaneling of the jury until its discharge. Although as this court subsequently decided, it was error for the municipal court to receive the report, and to refuse to strike it from its files, nevertheless it was for the time being on record as a public statement made in the course of a judicial proceeding. Until it was subsequently stricken from the files, it was like any other irrelevant or incompetent matter that has become part of the record by reason of an erroneous judicial ruling.

When the grand jury gives libelous imputations upon private citizens or upon public officers not touching their fitness for office or their fidelity to public trust, prior to their report to the court, or permits publication of material forbidden by law, qualified privilege does not attach.[55]

When the newspaper wrongly includes a name in a grand jury report as one indicted and such report is inaccurate the newspaper is liable. The *Boston Post* carried a report on a grand jury proceeding giving age, residence, and profession of "Mr. Sweet," as one of six persons indicted. The name of "Mr. Sweet" was in error and accordingly the plaintiff won his case for defamation against the newspaper.[56]

Privilege in Executive Proceedings

Proceedings before official governmental bodies, like the Federal Trade Commission, when these are semi-judicial in character,

[54] 211 Wis. 362, 368, 247 N.W. 435, 438 (1933).

[55] Parsons v. Age-Herald Pub. Co., 181 Ala. 439, 61 So. 345 (1913).

[56] Sweet v. Post Pub. Co., 215 Mass. 450, 102 N.E. 660, 47 L.R.A.,N.S., 240, Ann.Cas.1914D, 533 (1913); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1, 13 L.R.A. 97 (1891); Contra: Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N.E. 462, 20 L.R.A. 856 (1893) in which however Justice Oliver Wendell Holmes filed a dissenting opinion.

are privileged, and reports of such proceedings are entitled to the defense of qualified privilege if a libel suit were brought for an alleged defamatory statement in the report of such proceedings.[57] It is imperative, however, as in reports of judicial or legislative proceedings, that such reports be fair and accurate; the report of such proceedings must be based on facts, be free of comment, and give no imputation of sordid motives.

Reports of the minutes of a municipal water board [58] and an account of a fire marshal's report of an investigation [59] have been held entitled to qualified privilege.

Defamatory allegations in connection with governmental investigations by state highway or beverage commissioners as to themselves may be privileged; however, it is submitted that when a state beverage commissioner conducted raids in a town which had a considerable number of taverns and which had the reputation of being "an open town," a report of his findings in a newspaper would not be entitled to qualified privilege if such report contained with false imputation the name of a restaurant which had no license, which sold no liquor, and which enjoyed an unimpeachable reputation.

If an official opinion of an attorney general contained defamatory information which resulted in a libel suit against a newspaper publishing the opinion, the question of defense presents a problem. If possible, the newspaper could defend on the ground of truth or truth published with good motives for justifiable ends. As the giving of an opinion by the attorney general is an official act by a duly constituted public officer, a report of this official act should seem qualifiedly privileged.[60]

§ 62. REPORTING OF PLEADINGS

Details of court pleadings filed before opening of a case are generally not protected by qualified privilege.

The majority rule in the several states is that reports of pleadings in themselves are not privileged; [61] this position is taken on

[57] 3 Restatement, Torts, #611; Mack, Miller Candle Co. v. Macmillan Co., 239 App.Div. 738, 269 N.Y.S. 33, affirmed 266 N.Y. 489, 195 N.E. 167 (1934).

[58] Holway v. World Pub. Co., 171 Okl. 306, 44 P.2d 881 (1935).

[59] Conner v. Standard Pub. Co., 183 Mass. 474, 67 N.E. 596 (1903).

[60] Cobb v. Oklahoma Pub. Co., 42 Okl. 314, 140 P. 1079 (1914); Tilles v. Pulitzer Pub. Co., 241 Mo. 609, 145 S. W. 1143 (1912).

[61] Cowley v. Pulsifer, 137 Mass. 392,

the theory that even though one may be privileged in making whatever charges he wishes in his affidavits and pleadings, a newspaper in publishing the contents of such pleadings merely spreads information prior to any judicial action which would have in itself bestowed privilege.

The parties are of course privileged in their pleadings for the reason that they are addressed to the courts.[62] A pleading filed with the clerk of a court has not been officially submitted for judicial consideration and any report of the contents of such a pleading is not qualifiedly privileged.[63]

The *New Orleans Times* published the contents of an affidavit which the court, in Cass v. New Orleans Times,[64] declared to be false and malicious and held that in publishing the story wide circulation was given to false charges against the plaintiff.

The limitation on the press to prevent needless spreading of charges was emphasized in Metcalf v. Times Publishing Co.[65] as follows:

> As a publisher of news and items of public importance the press should have the freest scope, but as a scandal monger it should be held to the most rigid limitation. If a man has not the right to go around to tell of charges made by one against another, much less should a newspaper have the right to spread it broadcast and in enduring form. It is necessary to the ends of justice that a party should be allowed to make his charges against another, for adjudication, even though they may be of a libelous character, and as such they are privileged; the injured party having a remedy for malicious prosecution when they are made maliciously or without probable

50 Am.Rep. 318 (1884); Sutton v. A. H. Belo & Co., Tex.Civ.App., 64 S.W. 686 (1901); Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917, 38 L.R.A.,N.S., 913 (1911); Meeker v. Post Printing & Publishing Co., 55 Colo. 355, 135 P. 457, Ann.Cas.1915A, 126 (1913); Lundin v. Post Pub. Co., 217 Mass. 213, 104 N.E. 480, 52 L.R.A.,N.S., 207 (1914); Stuart v. Press Pub. Co., 83 App.Div. 467, 82 N.Y.S. 401 (1903); Williams v. New York Herald Co., 165 App.Div. 529, 150 N.Y.S. 838 (1914); Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258, 12 L.R.A.,N.S., 188, 11 Ann.Cas. 161 (1907). See also 3 Restatement of the Law of Torts #611 c.

[62] Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731, 1 L.R.A. 599, 16 Am.St.Rep. 544 (1888).

[63] Williams v. New York Herald Co., 165 App.Div. 529, 150 N.Y.S. 838 (1914); Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258, 12 L.R.A.,N.S., 188, 11 Ann.Cas. 161 (1907); Meeker v. Post Printing & Publishing Co., 55 Colo. 355, 135 P. 457, Ann.Cas.1915A, 126 (1913).

[64] 27 La.Ann. 214, 224 (1875).

[65] 20 R.I. 674, 678, 40 A. 864, 865, 78 Am.St.Rep. 900 (1898).

> cause. But the right of a party to make charges gives no right to others to spread them. When the charges come up for adjudication, however, although their publication may be as harmful and distressing to the person accused as if they had been published before their consideration by a court, a different rule applies.

It was further noted that if a garbled report of a trial is not entitled to privilege, much less should unfair and partial extracts from the pleadings be privileged.

In Park v. Detroit Free Press Co.,[66] the plaintiff sued the newspaper which had erroneously stated that he had been arrested and brought before one of the justices in Detroit on a bastardy charge and that upon his plea of not guilty to the bastardy charge, Park had been released on his personal recognizance to appear for a preliminary hearing; however the truth was that he was in fact the attorney for the prosecution in the bastardy case. The mistake in the use of his name occurred through the clerk of the justice who gave Park as the defendant in that case. His name was also on the file wrapper so as to appear as the defendant to the bastardy charge.

Emphasizing the necessity for strictness, the Michigan Supreme Court stated:

> There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. The parties, and none but the parties, control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no rights to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it. * * *
>
> Any-one, whether reporter or otherwise, who undertakes to give to the public the contents of a document which speaks for itself, and in which he has no personal concern, is bound, if he would reduce his liability, to use such a degree of care as is reasonably sure to prevent mistake, and to publish noth-

[66] 72 Mich. 560, 40 N.W. 731, 1 L.R.A. 599, 16 Am.St.Rep. 544 (1888).

ing not so obtained which will inure to the injury of another. There can be no different standard applied to reporters than to others, and the rule laid down by the court that such care as reporters generally use is the standard, is not a correct rule.[67]

Beiser v. Scripps McRae Pub. Co.[68] represents the minority rule as to the granting of privilege prior to the actual consideration of the case in court. *The following story was the basis of the action:*

TOOK A HORSE

Elsmere is in a State of Excitement —Charge is Preferred Against the Town Marshal

The little town of Elsmere, south of Erlanger, is in a state of great excitement over a technical charge of horse stealing preferred against Joseph Beiser, the town marshal, by Adam Guth, one of the town's best-known citizens. Monday, Guth went before Squire Childress and alleged that the marshal had, without reason, taken his horse and put it in the pound for the purpose of obtaining the $1.00 fine put on owners whose horses run at large. Guth alleges that his horse was not running at large, but that it was taken from his yard early Monday morning, where it was grazing. Mr. Guth was very indignant over the affair, and he claimed to the court that it was a common practice to take horses from pastures and put them in pound. When the case is tried before the squire the whole town will turn out to watch the proceedings. Marshal Beiser in emphatic language, denies that he took the horse from the yard.

The court in reversing the lower court decision for the defendant stated:

The question whether a mere application to a justice of the peace for a warrant of arrest constitutes the statement of the would be prosecutor to the magistrate a privileged matter, a fair and impartial publication of which is not libelous, does not seem to have been anywhere expressly decided. The courts of justices of the peace are undoubtedly a part of the judicial department of the government of the commonwealth. * * * Although the magistrate may not issue the warrant except upon information given him on oath, it would seem

[67] 72 Mich. 560, 568, 569, 40 N.W. 731, 734, 1 L.R.A. 599, 16 Am.St.Rep. 544.

[68] 113 Ky. 383, 68 S.W. 457, 24 Ky. Law Rep. 259 (1902).

> that, under the somewhat informal procedure which obtains with us upon such applications, the application to make the affidavit should be considered as within the rule, and as constituting a judicial procedure, if made to the justice in his judicial capacity, in good faith, for the purpose of such a prosecution. Such an application is not mere private or confidential communication. It is the first step in a criminal proceeding in a justice's court. It is not, and should not be, secret.[69]

Acceptance of the narrow rule in New York was marked in Campbell v. New York Evening Post [70] in which the court stated: "The filing of a pleading is a public and official act in the course of judicial proceedings."

Stone v. Hutchinson Daily News [71] represents the liberal philosophy in holding that an affidavit as the basis of a newspaper account merits qualified privilege. A reporter for the *Daily News* found the affidavit with a justice of peace, made his notes therefrom, and later interviewed the sheriff who made the return of a warrant in a search and seizure case, and the attorney, who with the approval of the county attorney, had instituted the search and seizure case. In these interviews the reporter learned of a conversion case being prosecuted in the district court involving the same property. The reporter wrote the entire story with the exception of the headlines which were written by a copyreader in his office. The Kansas Supreme Court affirmed the judgment for the defendant.

§ 63. HANDLING POLICE NEWS

Newspapers incur particular liability in reporting criminal investigations and news about arrests.

A newspaper has a right to publish the information that a person has been arrested, but this right does not permit any assertion of guilt to the party thus taken into custody.[72] For a fair and accurate report of an arrest, the newspaper is protected by

[69] 113 Ky. 383, 389–391, 68 S.W. 457–459, 24 Ky.Law Rep. 259 (1902).

[70] 245 N.Y. 320, 328, 157 N.E. 153, 156, 52 A.L.R. 1432 (1927).

[71] 125 Kan. 715, 266 P. 78, 58 A.L.R. 718 (1928).

[72] Usher v. Severance, 20 Me. 9, 37 Am.Dec. 33 (1841); Shelly v. Dampman, 1 Lack.Leg.News (Pa.) 77 (1895); Republican Pub. Co. v. Conroy, 5 Colo.App. 262, 38 P. 423 (1894); Rabb v. Trevelyan, 122 La. 174, 47 So. 455 (1908); Morasca v. Item Co., 126 La. 426, 52 So. 565, 30 L.R.A.,N.S., 315 (1910).

truth, particularly when published with good motives for justifiable ends; for a report of court proceedings connected or growing out of the arrest, the newspaper is protected by qualified privilege, despite the fact that the story may reflect upon the persons involved and tend to bring them into public disrepute.[73]

In covering a police story the *Detroit News* reported that one Ed Sherwood had been wounded in a gun battle, had stolen a car, and then had been arrested and identified by Trooper Milligan. It was later learned that the information given the reporter by a deputy sheriff was incorrect in respect to Ed Sherwood of Clifford. Sherwood recovered judgment in the trial court, but a new trial was granted upon reversal by the Michigan Supreme Court on technical grounds.

Inaccurate reporting of police news involves, of course, liability, particularly in the wrong use of names. In Hulbert v. New Nonpareil Co.[74] the name of the plaintiff was used without justification in the following story:

Charged With Seduction

Frank D. Shaffer, the liveryman on North Main street, was arrested yesterday afternoon on an information filed in Justice Vien's court by Lizzie Hulbert, a dressmaker residing at No. 728 First avenue, charging him with seduction. According to Miss Hulbert's complaint, Shaffer accomplished her ruin, under promise of marriage, about the 1st of April last. She also accuses him of being the father of her child, which is dead. Shaffer gave bonds in the sum of $300, and by consent of both parties the hearing of the case was set for Wednesday, November 18th, at 2 p. m.

Judgment for the plaintiff was affirmed by the Iowa Supreme Court, which noted that a false charge originating with the publisher is never privileged.

The Commercial Pub. Co. was sued in the Federal District Court of Tennessee for the publication of the following story:

Murderer Arrested

Augusta, Ark., Feb. 10th.—Sheriff Marshall Patterson arrested Fred Smith, camped in a tent ten miles north of Augusta, on White river. Smith is wanted at Kennett, Mo., for

[73] Urben v. Pittsburgh Times, 1 Monag. (Pa.) 135 (1889); Sherwood v. Evening News Ass'n, 256 Mich. 318, 239 N.W. 305 (1931).

[74] 111 Iowa 490, 82 N.W. 928 (1900).

> killing old man F. E. Porch, the incentive being robbery. The state of Missouri offered $300, the county $200, and the citizens of Malden $600, for Smith's arrest. Smith does not deny being the man wanted, but claims he did not do the killing.[75]

Smith sued for libel, winning in the lower court, only to have the decision reversed and a new trial ordered by the circuit court of appeals. The court stated that the publication of the fact that one has been arrested, and upon what accusation, is not actionable, if true. It granted the new trial so that the jury could determine whether the meaning of the entire article, story and headline, gave the impression that the person arrested was in fact a murderer. It is submitted that such a headline carries a sinister meaning and that the only safe rule is to state a fact, not an unproved conclusion. Such a headline should be "Arrested on Murder Charge."

In Norfolk Post Corp. v. Wright,[76] the plaintiff sued for libel on the ground of defamation in the following story:

> **SUSPECT NABBED**
>
> **Man Held in Colonial Place Robberies**
>
> Milton T. Wright, 25, Portsmouth, was arrested shortly before noon today by detectives Nowitzky and Williams, on Jamestown avenue, in connection with the burglary of numerous houses in Colonial Place recently.

On the face of the record Wright was not held for robberies in Colonial Place; rather he was arrested and held for housebreaking in Riverview. It was held that despite the fact that Wright had been held for housebreaking he had been libeled inasmuch as the judicial record was not accurately reported. It was pointed out that correctness of information is a risk that the newspaper assumes.

The plaintiff in Times-Dispatch Pub. Co. sought damages on the ground of the publication of the following story:

[75] Commercial Pub. Co. v. Smith, 149 F. 704 (C.C.A.Tenn.1907).

[76] 140 Va. 735, 125 S.E. 656, 40 A.L.R. 579 (1924).

DRY OFFICER TAKES MAYOR OF FAIRFAX

Arrested with Three Others on Charge of Storing Ardent Spirits

Charles Zoll, mayor of the town of Fairfax and justice of the peace, Peyton Young, Clarke Jones and Frank Clarke have been placed under arrest in Fairfax county by Virgil Williams, inspector for the state prohibition department, on charge of possessing ardent spirits. They will be tried the third Monday in January.

The judgment for the plaintiff in the trial court was upheld in the state supreme court on the grounds that there had been no investigation or trial in the case of Charles Zoll and that "They will be tried the third Monday in January" was not a fair and accurate statement based on the justice court investigation.[77]

Current facts about criminal news in the community may be published with impunity so long as facts are presented for the justifiable end of informing the citizenry about events affecting public safety and the administration of justice. The *Pittsburgh Times* published the following story:

ANTHONY B. URBEN'S MAD RAGE

He Takes Revenge for His Confinement by Shooting at His Family

Some time ago Anthony B. Urben, the druggist, was confined as an inebriate at the Mercy Hospital at the request of his wife. He sued the Sisters for unlawfully restraining him and obtained his release about a week ago on a writ of habeas corpus. He did not go to his home until about midnight last night when he appeared there in a state of madness. He forced his way into the house and fired two shots at random among his family. They were terror-stricken at his rage and ran out into the rain, while he roamed wildly about the house.

His brother at last appeared and after a severe struggle disarmed him and drove him out. He wandered away again,

[77] Times-Dispatch Pub. Co. v. Zoll, 148 Va. 850, 139 S E. 505 (1927).

whither is unknown, and is still at large. His family, dreading another attack, have taken refuge with his brother.

The trial court gave judgment for the defendant newspaper, a judgment which was affirmed by the Pennsylvania Supreme Court.[78]

Cincinnati Gazette Co. v. Timberlake[79] was early authority for the liability of the newspaper in printing police news. In that case, a reporter called at the station house and learned the particulars of C. L. Timberlake's arrest, which he published the following morning, as follows:

SWINDLING

Amongst the arrests at the Ninth-street stationhouse yesterday, appeared the name of C. L. Timberlake, who is charged with petit larceny; he having, according to the statement made, bought a land warrant of a lady for ninety-five dollars, and when the lady had signed the documents making the warrant over to him, he gave her seventy-six dollars, and would give her no more.

It developed in the evidence at the trial of Timberlake's suit against the *Gazette* that following publication of the police item Timberlake was acquitted. The court affirmed the judgment of the lower court against the newspaper, pointing out in its opinion:

If the publisher of a newspaper may, in virtue of his vocation, without responsibility, publish the details of every criminal charge made before a police officer, however groundless, and whether emanating from the mistake or the malice of a third party, then must private character be, indeed, imperfectly protected. Such publications not only inflict an injury of the same kind with any other species of defamation, but their tendency is also to interfere with the fair and impartial administration of justice, by poisoning the public mind and creating a prejudice against a party, whom the law still presumes to be innocent.[80]

The *Boston Traveler* made a successful defense for the publication of the following story:

[78] Urben v. Pittsburgh Times, 1 Monag. (Pa.) 135 (1889).

[79] 10 Ohio St. 548, 78 Am.Dec. 285 (1860).

[80] Ibid., 10 Ohio St. 555, 556, 78 Am.Dec. 285.

ARREST POST REPORTER IN SMITH LETTER CASE

Watchman at Atlantic Monthly Plant Also Held—Accused of Stealing Copy for Boston Newspaper Man

Fred. H. Thompson, a Boston Post reporter, of 150 Pleasant Street, Newton Centre, and William E. Callahan, watchman of the Rumford Press, Concord, N. H., were arrested today in connection with the larceny of copies of the Atlantic Monthly containing Gov. Al. Smith's article on Catholicism. Thompson was arrested by Inspector B. J. Goode of the Newton police force on a fugitive from justice warrant. Callahan was arrested at Concord charged with larceny. The warrant for Thompson was issued today in the Newton district court at the request of J. E. Silva, chief of police of Concord, N. H., and Herbert W. Raine, solicitor of Merrimac county, N. H. The specific charges in the warrant alleged that Thompson procured the commission of larceny by Callahan of eight printed pages, for which he gave Callahan $600. Thompson was bailed by David P. Shea in $1,000, for hearing tomorrow.

The court held that the warrant was issued under the seal of the court and bore the *teste* of the judge, thus making the story subject to qualified privilege.[81] This case is exceptional in that no judge was present at the proceedings.

Investigations by police officers, officials in the district attorney's office, or the coroner's office, are not privileged communications and so newspaper stories based on such reports or investigations are not accorded qualified privilege, according to the great weight of authority.[82]

In Augusta Chronicle Pub. Co. v. Arrington,[83] the story on which was based a suit for damages was as follows:

False Teeth Brings Wrens Man Trouble

One of the strangest charges of simple larceny that has ever been recorded at the police court was made yesterday

[81] Thompson v. Boston Pub. Co., 285 Mass. 344, 189 N.E. 210 (1934).

[82] McDermott v. Evening Journal Ass'n, 43 N.J.L. 488, 39 Am.Rep. 606 (1881); Nunnally v. Press Pub. Co., 110 App.Div. 10, 96 N.Y.S. 1042 (1905); Sherwood v. Evening News Ass'n, 256 Mich. 318, 239 N.W. 305 (1931).

[83] 42 Ga.App. 746, 157 S.E. 394 (1931).

when J. W. Arrington was arrested on a charge of stealing a pair of false teeth from J. W. Chambers of Wrens, father of R. L. Chambers of this city. The theft is said to have taken place at Broad and Thirteenth streets. Mr. Chambers had removed the teeth when Arrington asked if he might see them. Willing to accommodate, Chambers handled the artificial molars only to have Arrington cram them into his mouth and break into a run. He was overtaken, however. Detectives Reid, Mathews, Tebou, and Brown, J. W. Chambers, R. L. Chambers and Will Swint composed the formidable array of witnesses against the man.

The defendant corporation's demurrer was overruled but upon appeal the trial court's judgment was reversed in favor of the defendant; the information concerning the arrest was taken from the recorder's court record; the plaintiff did not prove any special damages to his business. The court stated, however, as its conclusion on principles the following:

> While a newspaper is privileged to publish a fair and honest report of a court proceeding, or a truthful report of information received from an arresting officer or police authorities (Civil Code 1910, § 4432), the publication is not privileged, when the newspaper in undertaking to publish only an account of a court proceeding, or the report of information given by an arresting officer or the police authorities, amounting only to a mere charge by the arresting officers or the police authorities of the commission of a crime, goes further and publishes a statement that the person charged with the commission of the crime is in fact guilty of the crime.[84]

Any unfair newspaper summary of a police investigation is not privileged. In Burrows v. Pulitzer Pub. Co.,[85] the plaintiff recovered damages for the publication of the following story:

Y. M. C. A. SAFE ROBBED OF $323 —THREE EMPLOYES GONE

Two Youths and Man Answering Their Description Said to Have Gone to Kansas City

The safe in the office of the Central Y.M.C.A. headquarters at Grand and Franklin avenues was robbed between 8:30 and 9:15 a.m. today while a meeting of officers was being held in

[84] 42 Ga.App. 746, 157 S.E. 394, 395.

[85] 255 S.W. 925 (St. Louis Court of Appeals 1923).

another room, and $323 in cash and 3 office employes are missing.

The employes are John Hanson, 15 years old; William Burns, 20, and Moyston Burroughs, 60. They were traced to Union Station, where it was learned they had bought railroad tickets for Kansas City.

Martin R. Murray, secretary of the Y.M.C.A., told the police the Hanson boy was left in charge of the office when the meeting was held. The safe was unlocked. After the meeting Murray entered the office and was surprised to find no one there. On the desk was a note written by Hanson. It read: "Going to California."

Hanson, Burns and Burroughs all lived in the Y.M.C.A. building. They were regarded as trustworthy office employes. Descriptions of the three men were given to the police. Detectives went to Union Station and were told that a short time before their arrival two youths and a man answering the descriptions had bought tickets to Kansas City and had entered the train shed to take a train.

Later the *St. Louis Post-Dispatch* published the following article:

YOUTH CONFESSES TAKING $23 FROM Y. M. C. A.; TWO EXONERATED

John Hansen, 16 years old, who admitted taking $323 from the office of the Central Y.M.C.A. last Tuesday, has been released from the house of detention. He has restored the money and will not be prosecuted. Hansen, who lives at the Y.M.C.A., was left in charge of the office while a meeting of executives was being held in another room. At the close of the meeting he and the money were missing.

Moyston Burroughs, 60 years old, and William Burns, 20, who also lives there, have been exonerated of any connection with the disappearance of the money. Investigation showed that they had been in the office lobby with Hansen, but were not there when he took the money and knew nothing of it. Their names were given to the police by M. A. Murray, executive secretary of the Y.M.C.A., as those of possible witnesses, but they had no difficulty in proving they knew nothing of the theft.

Hanson bought a ticket for Kansas City, but became conscience-stricken and did not take the train.

The information for the story was obtained in a conversation between the police reporter for the paper and a police sergeant.

In Jastrzembski v. Marxhausen,[86] the following stories were published on the basis of a conversation between an officer and the plaintiff's wife and other police information:

ELOPED WITH ANOTHER WOMAN

Felix Jastrzembski Leaves Wife And Children In Need

The police were notified today that the 24-year old wife of Felix Jastrzembski is living with four small children, in need and poverty, in the house at number 459 Forest avenue, where her husband, the carpenter Jastrzembski, left her in the lurch a week ago, and ran away with another woman, the 20-year old Agnes Hartung. Agnes boarded at the Jastrzembskis, and the fickle man fell in love with her, without having any regard for his family. Agnes' brother to-day reported his sister as missing. Where the couple have gone is unknown, though the police will endeavor to find out. Mrs. Jastrzembski found in one of her husband's coat pockets a photograph which represents him and Agnes Hartung as a couple. Here is an opportunity for benevolent minded women to make an effort and to ascertain how the abandoned family may be relieved from their sad want, without injuring those who have innocently fallen in want.

What Felix Jastrzembski Has To Say

Felix Jastrzembski, of No. 459 Forest avenue, declares that the complaints made by his wife against him are wrong and untrue. He says that he earns $12 per week, $7 of which he had given his wife to keep house. With that amount she did not get along, because she was too extravagant. He had criticised and severely protested against this, and the fight resulted therefrom, which caused his wife to make such report to the police. He is an honest man, and never had anything to do with the girl Agnes Hartung; did not know of her whereabouts, nor did it concern him; says that he had worked for Wm. Monroe, on Twenty-Eighth street, truly and regularly every day, and been home every day. Hence, how anybody can claim that he had deserted his wife he could not understand,—a worse lie never existed. The talk of distress was silly, for his wife had enough supply at the house to warrant good living for weeks. The whole matter, Mr. Jastrzembski says has been prompted and instigated by meanness, because he did not want to indiscriminately feed other people. That was the whole trouble.

[86] 120 Mich. 677, 79 N.W. 935 (1899).

The Case of Felix Jastrzembski Once More—More Explanations

We have once before shown in our columns that great wrong had been done to young Felix Jastrzembski by his wife, who accused him of desertion and eloping with another one, but we do repeat this to-day, not merely for the frequent talk arising out of the matter, but owing to the request of the employers of the accused, who have requested us for an honorable explanation, inasmuch as the latter is held in high esteem among his fellow workmen. There was no reason whatever to blacken the man to the police. The wife permitted herself to be led on slippery ice.

The trial court held for the plaintiff, but the Michigan Supreme Court, on technical grounds, reversed the judgment and ordered a new trial.

The *Rutland Herald* published the following story:

Brothers Await Trial for Theft

Arthur Lancour, 23, Locked Up with Floyd, 14; Store Robbery Alleged

Arraignment in Rutland Municipal Court of Floyd Lancour, 14, arrested on Tuesday on a charge of robbery while armed, and his brother, Arthur, 23, who was taken into custody yesterday in connection with the theft of 9 revolvers at the Wilson Clothing company store on Merchants Row, was postponed yesterday by State's Attorney Asa S. Bloomer, pending further investigation of the case.

The pair, sons of Mr. and Mrs. John Lancour of Evelyn street, are being held in Rutland city jail until their cases are presented in court.

Arthur was arrested on information given to police by the younger brother, it is said. According to authorities, Floyd in his alleged confession, stated that Arthur waited outside the window in the rear of the clothing store while Floyd climbed through a broken window the second time to destroy possible clues left behind. The revolvers stolen are valued at $150. The burglary took place late Saturday night.

The trial court gave judgment for the defendant newspaper, but this judgment was reversed by the Vermont Supreme Court

and the case remanded on the question of damages.[87] The court in its opinion stressed that a preliminary police investigation is not a judicial proceeding and so a newspaper report on the police activity in connection with a specific event is not qualifiedly privileged.

Probable cause for suspecting a person guilty of a crime is not sufficient justification for a newspaper imputing the commission of the the crime.[88] In Peoples v. Detroit Post & Tribune Co.,[89] the court stated:

> False assertions when they impute the commission of crime, are actionable, and, when not based upon any facts legally tending to prove the crime imputed, the publication cannot be said to be privileged.

Imputation of crime to a particular individual is not privileged merely because it may be considered a matter of news. In Mallory v. Pioneer Press Co.,[90] the story upon which the defamatory action was based stated:

> A young man named Frank Mallory, employed as driver and collector by A. H. Gow, has disappeared with some of his employer's funds, and the police have been notified.

The facts were that although Mallory left Gow's employ with some of his employer's funds in his possession, the employer owed Mallory more money than the amount retained. Mallory did not leave town, as was reported in the story. In his suit for damages for libel, Mallory was given judgment; the appeal from an order refusing a new trial was affirmed by the Minnesota Supreme Court.

In Palmer v. Bennett,[91] the defendant used the following publication:

[87] Lancour v. Herald & Globe Ass'n, 111 Vt. 371, 17 A.2d 253, 255, 132 A.L.R. 486 (1941).

[88] Long v. Tribune Printing Co., 107 Mich. 207, 65 N.W. 108 (1895).

[89] 54 Mich. 457, 462, 20 N.W. 528, 529 (1884).

[90] 34 Minn. 521, 26 N.W. 904 (1886).

[91] 83 Hun 220, 31 N.Y.S. 567 (1894).

PRESIDENT AND PAUPER

Speculator Dissipates a Railroad Magnate's Fortune. In Police Court at Last

A Policeman Recognizes in His Prisoner a Former Wealthy Employer

> Edward E. Palmer was for several years the president of the Dekalb Avenue Railroad Company in Brooklyn, and was at one time president of a bank in that city. He had a charming family, an elegant residence on Dekalb avenue, and was of considerable wealth. He speculated in cotton, and lost everything, and then took to drink. He has for some years been lost to his old friends. He lives, with his family, a short distance out of the city. He is not doing anything, and has no means, and when arrested was trying to raise a drink to brace up his shattered system.

The facts were that the description given to Edward E. Palmer in many particulars paralleled the business history of the plaintiff, Thomas Palmer. The court held for the plaintiff, a decision which was upheld by the appellate division of the supreme court, which stated:

> The article was published of that Palmer, the prisoner, but it does not follow that it might not reflect upon others. If false, it contained a libel on Edward E. Palmer, because of the charge of vagrancy and arrest. But when the article charged the identity of the plaintiff and Edward E. Palmer, there was then a libel on the former. If it is affirmed that A. and B. are the same person, and that B. has committed an offense, it is necessarily affirmed that A. has committed the offense. If A. and B. are in fact different persons and that the charge made is false as to both, then there is a libel on each; if false as to either then there is a libel on the one who is innocent.[92]

Judgment for the defendant in the trial court was reversed by the Michigan Supreme Court in McAllister v. Detroit Free Press Co.,[93] for the publication of the following:

> A week ago, it will be remembered that a safe was cracked in Bothwell and that $2,000 in money and about $30 worth of stamps were stolen. Yesterday two hard-looking citizens can-

[92] Ibid., 83 Hun 220, 31 N.Y.S. 568, 569.

[93] 76 Mich. 338, 43 N.W. 431, 15 Am.St.Rep. 318 (1888).

> vassed the entire business part of Windsor, in the effort to sell stamps at half price. They at last tried to sell stamps to Postmaster Wigle, who had them arrested. They were searched at the station, and upon one of them was found $30 worth of stamps. They gave their names as Edward H. McAllister and Lester B. French. Chief Bains will hold them to await developments.
>
> Edward H. McAllister and Lester B. French, the men who were arrested on Saturday for trying to dispose of stamps at half price, have been released, as there was no evidence to show that they were both wanted at Bothwell.

The facts were that both McAllister and French had been discharged by the police about the time the copy for the first story was given to the city editor. The reporter who prepared the story obtained his original information, in part at least, from a Windsor patrolman. A second story which noted their discharge did not mention that the men's innocence had been established. If the reporter had used the facts that the men were arrested on the charge of selling stamps without a license and that the police chief held them on the possibility that they had been connected with a certain robbery, the story might have been qualifiedly privileged.

The *Boston Post* lost its defense in a suit on the publication of the following statement:

> At the office of C. Henry Kimball, 97 Haverhill Street, officers, stockholders and lawyers interested in the Burrows Lighting & Heating Company met this morning. The affairs of the Burrows Lighting & Heating Company have been before the public for a considerable time and are apparently in a badly tangled condition. An order of notice was recently issued by the Superior Court against C. Henry Kimball, William Galletly, and the Burrows Lighting & Heating Company, ordering them to appear in court on Thursday of this week to show cause why they should not be restrained from holding any meeting. The charges were that the holders of a majority of the capital stock of the company had fraudulently secured control over 416,000 shares of stock.

The Massachusetts Supreme Judicial Court emphasized that while the meeting of the directors of a corporation would be a privileged occasion on the basis of common interest in the corporation no privilege would be extended to the publication of the proceedings in the press.[94]

[94] Kimball v. Post Pub. Co., 199 Mass. 248, 85 N.E. 103, 19 L.R.A.,N.S., 862, 127 Am.St.Rep. 492 (1908).

CHAPTER 11

FAIR COMMENT

Sec.
64. Fair Comment as a Defense.
65. False Imputations.
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§ 64. FAIR COMMENT AS A DEFENSE

Right of fair comment as distinguished from qualified privilege.

Fair comment as a defense to libelous defamation finds its right in the United States Constitution, the several state constitutions, and the common law. In their respective bills of rights, the Federal and state governments have guaranteed liberty of the press and freedom of speech, thus reasserting the natural right to speak and write one's sentiments or opinions. The common law foundation for this defense lies in a long line of English cases, which found their authority in the now historical victories for freedom of the press.

The defense of fair comment differs from the defense of justification in that in the latter the truth, except as limited by statute, counteracts the defamatory charge; in the former, the truth of the basic facts only must be established as a basis of the comment, which if fair although perhaps injurious and if concerning a matter of public interest, will defeat the plaintiff's case. Further, in the defense of justification, the attitude or intention of the defendant makes no difference whatsoever; however, in the defense of fair comment, it must be established that when the comment was made, the defendant had what he believed to be facts in mind before he expressed his opinion thereon.

Fair comment, in order to succeed as a defense, must be based on a matter of public interest as distinguished from a wholly private interest. In Triggs v. Sun Printing and Publishing Association,[1] the court stated:

[1] 179 N.Y. 144, 155, 71 N.E. 739, 743, 66 L.R.A. 612, 103 Am.St.Rep. 841, 1 Ann.Cas. 326 (1904).

> The single purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public policy.

The defense of fair comment differs from the defense of privilege in that fair comment is open to any individual, newspaper, or periodical and may be used so long as the comment is fair and based upon facts of public interest, while privilege arises only upon certain well recognized occasions wherein there is a common interest, a duty to protect a wholly private interest, or some other moral, social, or legal duty. It was stated in Merivale v. Carson: [2]

> A privileged occasion is one in which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But, in the case of criticism upon a published work, every person in the kingdom is entitled to do, and is forbidden to do exactly the same things, and therefore the occasion is not privileged.

Pointing out the distinction between fair comment and privilege, the court in Van Lonkhuyzen v. Daily News Co.[3] stated:

> Bona fide comments on matters of public interest are not privileged; because it is the right of every one, not the privilege of any particular one, to comment fairly and honestly on any matter of public interest, and the defense of fair comment is equally applicable whether the criticism be oral or written. One distinction between fair comment and privileged communications is that in the latter case the words may be defamatory, but the defamation excused or justified by reason of the occasion, while in the former case the words are not defamation of the plaintiff and hence not libelous.

A clear statement on the distinction may well be noted from Bearce v. Bass [4] as follows:

> It is sometimes said that fair and honest criticism in matters of public concern is privileged. But this is not true in a strictly legal sense. The distinction between fair and

[2] (1887) 20 Q.B. 275, 280, 58 L.T. 331.

[3] Van Lonkhuyzen v. Daily News Co., 203 Mich. 570, 588, 170 N.W. 93, 99 (1918).

[4] 88 Me. 521, 541, 34 A. 411, 413, 51 Am.St.Rep. 446 (1896).

> reasonable comment and criticism, and privileged communications is this: That in the latter case the words may be defamatory but the defamation is excused or justified by reason of the occasion; while in the former case, the words are not defamatory of the plaintiff, and hence not libelous,—the stricture or criticism is not upon the person himself, but upon his work. So long, therefore as the criticism is confined to his work, and does not attack the moral character or professional integrity of the individual, and is fair and reasonable, there is no libel, because there is no defamation of the man himself. But, when the comment or criticism of the man's work becomes an attack on his private or business character, then the element of malice comes in and stamps the language as libelous.

Fair comment and qualified privilege are similar in that actual malice upon the part of the publisher (defendant) will defeat either of these defenses, when the plaintiff has established such malice despite the apparent proof of the defendant that the alleged libelous statement was either fair comment or protected by qualified privilege.

What may be fair comment is difficult to determine. It may be said that fair comment is what reasonably prudent men think would be fair under a given set of circumstances. In other words, the problem for the jury is to determine if the comment in question would be fair in the minds of reasonable men.

Fair comment to be valid and legally acceptable must possess the following attributes:

a. The comment must be an intellectual appraisal or evaluation.
b. The comment must be founded upon facts, or what in the mind of a reasonable man would normally be accepted as facts.
c. The comment must be free from any imputation of sordid or corrupt motives.
d. The comment must be the result of honest opinion.
e. The comment must be free from malice.
f. The comment must be upon a subject possessing public interest.

The newspaper has no more right to make comment or criticism than any individual citizen,[5] but it is essential that any comment by a publication or an individual to be a valid defense must be fair.[6] Whether the comment is *bona fide* or exceeds

[5] Van Lonkhuyzen v. Daily News Co., 203 Mich. 570, 170 N.W. 93 (1918).

[6] Cook v. Pulitzer Pub. Co., 241 Mo. 326, 145 S.W. 480 (1912).

the limits of fair criticism and whether the imputation upon another's motives arose fairly are questions for the jury.[7]

Comment may be severe and caustic,[8] and even indulge in bitter and intemperate denunciation so long as such criticism is based on facts or on such inferences from facts that a reasonable man would consider such criticism a fair appraisal of a given situation. The general policy of the law however is to make a marked distinction between sharp criticism that might prove annoying or embarrassing, even though founded on facts, and the assertion of acts of criminality or disgraceful conduct without any basic foundation. The newspaper no more than the individual cannot with impunity commit libel under the guise of fair comment.[9] The press may comment freely on all matters of public concern so long as such comment is fair;[10] the right of fair comment ceases when the defendant in a libel suit is actuated by malice.[11]

Privilege, in applying to reports of judicial, legislative, or official proceedings, covers what was said or done; others' opinions may be reported as having been expressed, or as acts of expression. In fair comment, however, the opinion as expressed represents not facts but subjective reactions to a definite set of facts.

A fact may be defined as an act, a circumstance, an incident, or a truth. An automobile accident occurs and so is a fact; the law of gravitation is an accepted scientific principle and may then be regarded as a fact. Definite undisputable circumstances may exist and are accordingly accepted as facts to be considered in relation to definite problems. A fact then may be accepted as representing existence, material or immaterial. A comment on the contrary is a mental reaction to a given stimulus, which may be either a fact or someone's opinion. A comment is relative; it is the expression of one's mental processes; a comment may be influenced by one's own emotional reaction as well as by his own conception of what the facts may be. A comment represents a degree of reaction. One

[7] Merrey v. Guardian Printing & Publishing Co., 79 N.J.L. 177, 74 A. 464 (1909), aff. 81 N.J.L. 632, 80 A. 331 (1911).

[8] Lukaszewicz v. Dziadulewicz, 198 Wis. 605, 225 N.W. 172 (1929).

[9] Nevada State Journal Pub. Co. v. Henderson, 294 F. 60 (C.C.A.Nev. 1923).

[10] Hills v. Press Co., 122 Misc. 212, 202 N.Y.S. 678 (1924), aff. 209 N.Y.S. 848, 214 App.Div. 752 (1925).

[11] McClung v. Pulitzer Pub. Co., 279 Mo. 370, 214 S.W. 193 (1919).

may dislike a play or a book, he may enjoy an entertainment or he may be bored. His reaction may express his evaluation as bad, good, or some degree between the extremes of very bad and excellent.

Good intention and honest purpose in themselves will not be sufficient to establish a defense of fair comment, although the facts upon which the comment was founded were true. The comment may have been made in recklessness, or it may have exceeded the bounds of what reasonable men would consider fair.[12]

If the comment were made in disregard of the facts, it will not be considered fair, and likewise if the comment were unreasonable.[13] If the comment were malicious, it could not be fair comment.[14] In Hunt v. Star Newspaper Co., Ltd.[15], it was stated:

> The question for the jury is whether the comment is, in their opinion, beyond that which a fair man, however extreme might be his views in the matter, might make honestly and without malice, and which was not without foundation. * * * It is for them to say whether the imputation was warranted by the facts and honestly represented the opinion of the person who gave expression to it. * * * It is for the jury, * * * to find whether the imputation based upon facts truly stated does or does not honestly represent the opinion of the person who gives expression to it and was not without foundation.

The criticism must be relevant, not a cloak for invective or personal imputations not arising out of the subject matter of the facts on which the criticism is based.[16]

When the writer goes beyond the limits of fair criticism, he passes into the possibility of actionable libel. If the jury considers that the criticism would be regarded unfair by unprejudiced minds, it is for them to declare that the bounds of unfair comment have been exceeded. It is not within the province of the jury to consider isolated passages; rather they must consider the criticism as an entirety. If they (the jury) find that there have been deviations from the facts, the jury must find for the plaintiff; however, if the deviations from the facts

[12] Campbell v. Spottiswoode, 32 L. J.Q.B. 185 (1863).

[13] Ibid.; see also James v. Haymes, 160 Va. 253, 168 S.E. 333 (1933).

[14] Gott v. Pulsifer, 122 Mass. 235, 23 Am.Rep. 322 (1877).

[15] (1908) 77 L.J.K.B. 732, 740.

[16] McQuire v. Western Morning News, (1903) 72 L.J.K.B. 612.

are minute, within the latitude of fair and honest discussion, and such as might be entertained by persons of different schools of thought, as for example, liberal or conservative, the jury should find for the defendant.[17]

It is not within the province of a newspaper to delve into the private affairs of private citizens when such affairs cannot be matters of public concern. It was held in Pfister v. Milwaukee Free Press Co.,[18] that a private citizen's affairs may not be criticized with impunity merely because such affairs bear some relation to public affairs. A newspaper may comment upon anything that affects the public but the inferences may not be extended beyond legitimate inferences from the established facts.[19]

Comments like "crank," "shark," and "double-crosser" present problems not always easy to answer. The plaintiff, in Walker v. Tribune Co.,[20] sued for being called a crank. The defendant's demurrer to the complaint was sustained on the ground that to call another a crank would not be libelous unless special damage could be shown.

In Peck v. Coos Bay Times Pub. Co.,[21] the plaintiff was called a double-crosser, which the court stated in its opinion to be libelous. The supreme court reversed the decision on technical grounds and remanded the case for a new trial. The comment "double-crosser" naturally infers deceitfulness, and holds up the person thus called to contempt and ridicule; it would be a comment libelous *per se*.

To label another with the term "shark" is not necessarily to commit libel, it was held in Powell v. Young.[22]

The defendant, in Hubbard v. Allyn,[23] caused the following to be published in the *Valley Echo* and the *Westfield Daily Times:*

> The recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries brings a lesson of no little importance—the fallacy of expecting to get a large quantity of a good article for a small price. Such purchasers are among the greatest enemies and hindrances to the advent of pure food, inasmuch as they create a demand for cheap, worthless

[17] Merivale v. Carson, (1887) 20 Q. B. 185, 58 L.T. 331.

[18] 139 Wis. 627, 121 N.W. 938 (1909).

[19] Snyder v. Fulton, 34 Md. 128, 6 Am.Rep. 314 (1871).

[20] Walker. v. Tribune Co., 29 F. 827 (C.C.Ill.1887).

[21] 122 Or. 408, 259 P. 307 (1927).

[22] 151 Va. 985, 144 S.E. 624, reversed, 151 Va. 985, 145 S.E. 731 (1928).

[23] Hubbard v. Allyn, 200 Mass. 166, 86 N.E. 356 (1908).

> articles. Pure vanilla wholesales at about $12 per gallon. What can one expect for $2.75? He who buys at this price is either criminally stupid or deliberately dishonest. * * * The extract in question was an evil smelling concoction as innocent of vanilla as some saloons are of whiskey. * * * A dealer as in the present case, stands absolutely without excuse for purchasing an article of this extreme character. * * * It is the attitude of the local board of health to prosecute to the limit any such flagrant violation of public confidence and physical welfare.

The trial court held for the plaintiff; the exceptions of the defendant were overruled by the supreme judicial court on the ground that the comment based on a false premise was not a fair comment. At the trial it was shown that the vanilla cost $4, not $2.75 a gallon. It should be noted that although the baker was not named in the article there was sufficient reference to this small town baker so as to give identification.

A comment in regard to a popular song was found without basis of fact in Brown v. New York Evening Journal.[24] The trial court denied the motion to dismiss the complaint, and commented that the right of criticism is not broad enough to cover false statements by attacking the character or professional status of the author. The statement which appeared in a so-called chatter column gave the inference of plagiarism, a charge which would be actionable *per se*. The decision was affirmed by the appellate division which however gave permission for the defendant to answer. The *Journal* comment was as follows:

> A girl who signs herself simply "Mazie" insists "I suppose you have heard the song called 'My Song,' the one Rudy Vallee sings in the Scandals, I don't think you know that it was written by an eighteen-year-old high school boy who lives here in Clifton, N. J. His name is Jack Fina. After he composed the song he sold it for $200 thinking it would never be popular. You can imagine how he feels now."

§ 65. FALSE IMPUTATIONS

Criticism based upon falsity of fact and inference of base and sordid motives defeats right of fair comment.

Confusion in opinion exists as to the freedom to discuss the merits and demerits of public officers and candidates for public

[24] 143 Misc. 199, 255 N.Y.S. 403 (1932); aff., 235 App.Div. 840, 257 N. Y.S. 903 (1932).

office. Any man seeking or enjoying public life submits himself to public criticism, waiving his right to privacy; however, the question remains as to the extent of the criticism of his private life. Anything that affects his public character or public efficiency may be criticized with impunity so long as the criticism is founded upon facts, is published for the public benefit for justifiable ends, and is such that reasonable men under the circumstances would regard as fair.

The public officer or the candidate does not sacrifice himself entirely to the unjustifiable criticism of the public; despite his public character, his private character is entitled to the right of reputation. If a newspaper should charge a politician falsely with murder, for example, the politician could recover in damages for a libel *per se* to his reputation. Likewise, if a newspaper should charge falsely a public officer with some misfeasance or malfeasance in office which if true would bring about his removal, there would be an actionable libel.

A published charge that a certain candidate is unfitted for the office he seeks would not be libel, if it were a fairly and reasonably expressed opinion, and if there were no malice and the reasons were founded on facts.

The general rule is that aspersions upon an officer or candidate, false in fact are libelous, irrespective of the motives of the publisher.

The right of fair comment and criticism does not include the falsification of facts. This so-called narrow rule is the majority holding in the United States.[25]

The narrow view on the criticism of candidates for public office finds particular support in Post Publishing Co. v. Moloney [26]

[25] Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919); Parsons v. Age-Herald Pub. Co., 181 Ala. 439, 61 So. 345 (1913); Arizona Pub. Co. v. Harris, 20 Ariz. 446, 181 P. 373 (1919); Cooper v. Illinois Pub. and Printing Co., 218 Ill.App. 95 (1920); Cooper v. Lawrence, 204 Ill. App. 261 (1917); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97 (1891); Hubbard v. Allyn, 200 Mass. 166, 86 N.E. 356 (1908); Commonwealth v. Pratt, 208 Mass. 553, 95 N.E. 105 (1911); Haynes v. Clinton Printing Co., 169 Mass. 512, 48 N.E. 275 (1897); Owen v. Dewey, 107 Mich. 67, 65 N.W. 8 (1895); Estelle v. Daily News Pub. Co., 99 Neb. 397, 156 N.W. 645 (1916); Estelle v. Daily News Pub. Co., 101 Neb. 610, 164 N.W. 558 (1917); Lindsey v. Evening Journal Ass'n, 163 A. 245, 10 N.J.Misc. 1275 (1932); Oklahoma Pub. Co. v. Kendall, 96 Okl. 194, 221 P. 762 (1923); Houston Press Co. v. Smith, 3 S.W.2d 900 (Tex.Civ. App.1928); Ferguson v. Houston Press Co., Tex.Civ.App., 1 S.W.2d 387, aff. Com.App., 12 S.W.2d 125 (1927).

[26] 50 Ohio St. 71, 89, 33 N.E. 921, 926 (1893).

and Post Publishing Co. v. Hallam.[27] In the former the court stated:

> In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of law, for injury to each, is secured by the same constitutional guaranty, and the one is no less inviolate than the other. To hold otherwise, would, in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputation; and thus defeat the object of the rule contended for, and overturn the reason upon which it is sought to sustain it.

The latter, holding for the narrow or majority rule, sets forth the fundamental philosophy of its view as follows:

> The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. * * *
>
> But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted; and yet the rule complained of is the law in many of the states of the Union and in England.[28]

In Hubbard v. Allyn,[29] the court stated:

> The right of the defendant was not to make false statements of fact because the subject matter was of public interest, but only to criticise, discuss and comment upon the real acts of the plaintiff and the consequences likely to follow from them, or upon any other aspect of the case in a reasonable way. This may be done with severity. Ridicule, sarcasm, and invective may be employed. But the basis must be a fact, and not a falsehood.

[27] 59 F. 530 (C.C.A.Ohio 1893).
[28] Ibid., 540, 541.
[29] Hubbard v. Allyn, 200 Mass. 166, 170, 86 N.E. 356, 358 (1908).

It is one thing to criticize the acts of a public character; it is quite another to impute to him sordid motives. In the now celebrated case of Campbell v. Spottiswoode,[30] the court said:

> A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be open to ridicule or disapprobation, base, sordid and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.

If, on the contrary, the jury finds an imputation of sordid motives, and there are no facts to justify such a conclusion, the defense of fair comment will generally fail; then the so-called criticism becomes defamatory.[31]

There is however another group of rulings that extends the protection of fair comment, or loosely expressed as qualified privilege, to statements honestly made and based upon probable cause.

This minority or liberal ruling is that comment may be regarded as fair despite false statements of fact. In Jackson v. Pittsburgh Times,[32] the court in upholding a judgment for the defendant in the trial court stated:

> The plaintiff was at the time a public officer, actually on duty in performing a very grave and serious public service. Such persons are amenable to public criticism in the newspapers, without liability for libel, if there was probable cause for their comments though the statements are not strictly true in all respects.

In Coleman v. MacLennan,[33] the court stated:

> The moral and social duty of members of a great fraternity or of a great church organization to inform their brothers of the scandalous conduct of a fellow member or one of their leaders is no higher or stronger than that of electors to keep the public administration pure by warnings respecting the character and conduct of a candidate for office; and if false words are not actionable in one case unless published with actual malice they are privileged to the same extent in the other.

[30] Campbell v. Spottiswoode (1863) 32 L.J.Q.B. 185, 3 B. & S. 769, 776.

[31] Joynt v. Cycle Trade Pub. Co., (1904) 73 L.J.K.B. 752, 2 K.B. 292.

[32] 152 Pa. 406, 416, 25 A. 613, 616, 34 Am.St.Rep. 659 (1893).

[33] 78 Kan. 711, 728, 98 P. 281, 361, 20 L.R.A.,N.S., 361, 130 Am.St.Rep. 390 (1908).

In Tanzer v. Crowley Pub. Corporation,[34] it was stated that one who holds public office must expect criticism, even though such criticism may be captious, ill-timed, and lacking in factual basis so long as there is no charge of corruption or gross incompetence such as would hold up the public officer to disgrace and contumely.

§ 66. CANDIDATES AND PUBLIC OFFICERS

Those seeking public office are open to critical review of their fitness and qualifications; public officials may be criticized on the basis of fitness for their work and their service in public employment.

Newspapers enjoy the right to criticize freely public officers and candidates for office, but they are responsible for the abuse of this right.[35] Corruption in public affairs need not be suffered in silence.

In Commonwealth v. Clap,[36] the court stated:

> When any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office.

The mere fact that one is a candidate for public office does not constitute a license to a newspaper publisher to injure one's reputation in his private capacity.[37]

The public acts of public men may be the subject of fair comment and criticism, by both individual citizens and newspapers. It is important, however, that the criticisms though severe be founded upon actual facts. In Lindsey v. Evening Journal Assn.,[38] the court made clear its opinion as follows:

> There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism, and allegations of fact, such as that dis-

[34] 240 App.Div. 203, 268 N.Y.S. 620 (1934).

[35] Annenberg v. Coleman, 121 Fla. 133, 163 So. 405 (1935).

[36] 4 Mass. 168, 169, 3 Am.Dec. 212 (1808).

[37] Jackson v. Stevens, 201 Ill.App. 135 (1916).

[38] 163 A. 245, 248, 10 N.J.Misc. 1275, 1280 (1932); Schwarz Bros. Co. v. Evening News Pub. Co., 84 N.J.L. 486, 87 A. 148 (1913); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1, 13 L.R.A. 97 (1891).

graceful acts have been committed or discredible language used.

The fundamental, well-settled rule holds that criticism cannot be safely based upon inferences alone. Animadversion upon the conduct of a public officer is not libelous if the criticism is fair and possesses a factual basis.[39] This right to review and evaluate the acts and conduct of public men includes the right to draw inferences even as to motives, whether such inferences are correct or not, provided such comments were made in good faith and were founded upon the truth.[40]

Justice Cooley dissenting in a leading case[41] pointed out the need for free and liberal discussion, as follows:

> The beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indifference. * * * Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his victims, and every fact and every inference be justified by unquestionable legal evidence? The undoubted truth is that honesty reaps the chief advantages of free discussion; and fortunately it is honesty also that is least liable to suffer serious injury when the discussion incidentally affects it unjustly. * * * The law, justly interpreted, is not chargeable with the inconsistency of tempting conductors of the press with a deceptive pretence of liberty, and then punishing them in damages if they act upon the assumption that the liberty is genuine.

Defamatory charges against a public officer, when such charges are malicious and without probable cause on the part of the publisher for believing them true, are extremely dangerous. When a public officer is criticized to the extent of a libel upon his character, the publisher will be liable irrespective of whether he believed the statements true or not; when such statements are malicious, there is the possibility under common law principles that punitive damages will be awarded.

[39] Vance v. Louisville Courier-Journal Co., 95 Ky. 41, 23 S.W. 591 (1893).

[40] McClung v. Pulitzer Pub. Co., 279 Mo. 370, 214 S.W. 193 (1919).

[41] Atkinson v. Detroit Free Press Co., 46 Mich. 341, 382, 383, 384, 9 N. W. 501, 523, 524 (1881).

Any public officer who fails to perform his public duties is subject to honest criticism, though the criticism may be severe.[42]

In commenting on a judge, the commentator needs to distinguish between the case and the judge himself. Any comment upon the case, if it tends to hinder the administration of justice, is subject to criminal contempt proceedings. If the judge is scandalized in a comment by the press, he may sue for libel on his right as an individual or he may cite for contempt of court.

The newspaper may criticize the conclusions of law as given by the courts, or censure the methods of procedure so that errors and abuses may be corrected. The press, as well as the individual citizen, is allowed great latitude in such criticism, so long as the criticisms are founded on truth and are expressed sanely with good motives and for justifiable ends.

A frank opinion on the criticism of judges was stated by Judge Alvin C. Reis of the Dane County Circuit Court in Madison, Wisconsin, in his decision on a motion for a change of venue for a man charged with obtaining money from the county under false pretenses. The defense sought this change of venue because of the belief that the defendant's case would be prejudiced because of newspaper stories which had appeared in the local press. The opinion is significant, because it represents the view of a trial judge trained in both journalism and the law. Judge Reis said in part:

> Newspapers should be allowed entire freedom, not only in the interests of free government but in the interest of good government, to criticize public officials. It does not make any difference whether the person criticized be a county board member or a judge. None is above criticism.

The candidate for public office puts his qualifications and character before the public, thus making himself the proper subject for comment and criticism.[43] The only limitation of such criticism of a political candidate is that the criticism be *bona fide,*[44] and fair. One's reputation may be shady and perhaps disgraceful on many points which might be difficult to prove, but so long as he remains in private life the likelihood of unfavorable comment in the press upon his character is small; his protection in case of defamation would be an action in libel. However,

[42] Williams v. Standard-Examiner Pub. Co., 83 Utah 31, 27 P.2d 1 (1933).

[43] Starks v. Comer, 190 Ala. 245, 67 So. 440 (1914); Express Printing Co. v. Copeland, 64 Tex. 354 (1885).

[44] Carpenter v. Meredith, 122 Va. 446, 96 S.E. 635 (1918).

when one announces himself as a candidate for office his private life and even his vices may become a matter of public concern.[45]

Be the comment severe, the newspaper so commenting is not responsible so long as the newspaper has an honest regard for the truth.[46] In Otero v. Ewing,[47] it was noted that there was no offense in stating that the plaintiff possessed neither the ability nor other qualifications for a judgeship but that when the defendants charged that he was an agent and partner with notorious criminals and that he received weekly payments from gamblers, the defendants went beyond the limits of fair criticism unless they could establish the truth in defense.

An outstanding example of an attempt to blacken the name of a candidate for president of the United States was a comment by the *Iron Ore,* published at Ishpeming, Michigan, during the campaign of 1912. This paper stated "Roosevelt lies and curses in a most disgusting way; he gets drunk too, and that not infrequently, and all his intimates know about it." [48]

Theodore Roosevelt determined to defend his honor and sued George A. Newett, the publisher, for libel. His counsel assembled an impressive panel of character witnesses, and following the testimony, the defendant Newett asked to withdraw his charge and apologize. The court awarded nominal damages of six cents.

Theodore Roosevelt, in 1914, commented upon William Barnes, Jr. of the *Albany Evening Journal,* calling him a boss and partner in a bipartisan deal with the state Democratic machine for the benefit of crooked business. Barnes sued Roosevelt for libel, but the jury decided for the defendant Roosevelt.[49]

As a result of editorials in the *Indianapolis News* and the *New York World* criticizing the deals in which the Republic of Panama was founded and the arrangements for the building of the Panama Canal were made possible, the Federal government instituted criminal libel proceedings against these two newspapers and their editors; the case against the *Indianapolis News* was dismissed by the court; the case against the *World* was quashed and this judgment was affirmed by the United States

[45] Briggs v. Garrett, 111 Pa. 404, 2 A. 513, 56 Am.Rep. 274 (1886).

[46] Dunnebacke v. Tribune Printing Co., 108 Mich. 75, 65 N.W. 583 (1895); Collins v. Press Pub. Co., 211 Wis. 140, 246 N.W. 563 (1933).

[47] 162 La. 453, 110 So. 648, 56 A.L.R. 249 (1926).

[48] Thayer, William Roscoe, Theodore Roosevelt, pp. 397, 398; The Milwaukee Sentinel, June 1, 1913.

[49] Ibid., 399–401.

Supreme Court.[50] These cases represent a victory for the newspaper's right to criticize the government.

In Estelle v. Daily News Pub. Co.,[51] the publication charged that the plaintiff who was seeking re-election associated with "the third crowd" which was established in proof as composed of thieves, gamblers, pimps, and ballot-box stuffers. Estelle, the plaintiff, bore an exemplary reputation having been a Chautauqua lecturer and department commander of the Grand Army of the Republic for the district of Nebraska; the evidence disproved the imputations of the publication. The verdict for $10,000 for the plaintiff was affirmed by the Supreme Court of Nebraska.

In the classic case of Sweeney v. Baker,[52] the defendant published in part the following:

> The laboring men of Wheeling are asked to vote for a man, who never earned an honest penny, or did a stroke of labor in his life. Honest industry loathes such an association. * * * Would you select a man to make laws, whom you would kick out of your house, and would not trust in your hen-coop? * * * No man in the community has any interest in seeing the county disgraced by sending a social leper to speak and act for them in public councils. * * * It is as much the duty of the citizen to vote against Jimsweeney as it would be to deodorize against the cholera.

In affirming the trial court judgment for the plaintiff the court stated:

> A person, who publishes in a newspaper falsely, that a candidate for such an office is a professional gambler, a bully, a thief and a whoremaster, ought to be severely punished.[53]

The *Columbia Record* published the following story of a political meeting:

[50] Heaton, John L., The Story of a Page, pp. 263–284.

[51] 101 Neb. 610, 164 N.W. 558 (1917).

[52] Sweeney v. Baker, 13 W.Va. 158, 164, 31 Am.Rep. 757 (1878).

[53] 13 W.Va. 158, 194, 31 Am.Rep. 757.

DRIVE OPENS IN LEXINGTON

Crowd Hears Aspirants Make Maiden Talks Wednesday at Summerland

(Special to The Record)

Lexington, July 20.—The county political campaign opened at Summerland today with about 1,700 people attending the first meeting. County Chairman Cyrus L. Shealy presided.

Dr. E. L. Dreher, Leesville, candidate for the Senate, was the first speaker.

He charged the present delegation with taking away the privilege of the people to elect their own commissioners and with hogging the Lexington Water Power Company.

Saluda, he said, had received $75,000.00 for damaged roads, while Lexington received only "two creosoted pine pole" bridges. "Cip Jones," he declared, "said two years ago 'we don't want money, we want roads and bridges.' We didn't get the roads and bridges. Who got the money?" he asked.

Tillman Jackson declared himself for an economy program.

Rural school education was the keynote of the speech of George Kraft.

Alfred G. Smith declared he would, if elected, see that factories were brought to Lexington.

C. E. Taylor, the last senatorial candidate to speak, said his past record was an open book. He charged C. E. Jones and Tillman Jackson with stealing the school bill he had worked on for three weeks. Jones, he said, had helped to rob more women and children in and around Batesburg than anybody ever had and he had helped organize one of the most gigantic steals ever put over on the people.

Candidates for the house of representatives and county officers were to be heard later in the afternoon.[54]

In affirming the trial court's decision for the defendant newspaper the court pointed out that the meeting was quasi privileged, that the reference to Jackson's stealing the idea for a school bill was no more than a lack of courtesy, and that the reference to Jones's robbing women and children had no reference to Jackson.

[54] Jackson v. Record Pub. Co., 175 S.C. 211, 178 S.E. 833 (1935).

The extent of the freedom to criticize public officials is well illustrated in two Wisconsin cases, Grell v. Hoard,[55] and Hoan v. Journal Co.[56] The *Jefferson County Union* published the following comment:

> The *Milwaukee Sentinel* says the acceptance of the deadly grade-crossing by Americans as a necessary evil of their civilization is like the acceptance by the patient and benighted Hindu of the presence of the deadly cobra, knowing that this inmate of his hut will sooner or later cause himself or some member of his family to die. It is not alone the grade-crossing that had a Hindu-like acceptance here. There is the deadly side ditch as well. A car gets off the beaten track, goes into the ditch, turns over, and pins the owner underneath. The "highwayman" who dug the ditch with a machine apparently built for murder, says, "It's not my fault, he must have been speeding—my penalty for speeding is death." Isn't it about time we revived the old word "highwayman" for a man who will take an innocent road like our high road to Jefferson and dig ditches alongside it? Mr. Grell has taken many other innocent roads since and has made killers of them. In the old days a "highwayman" was a killer. What's the difference?

Grell filed a complaint setting forth ten causes of action, based on ten separate publications. The defendants demurred and all its demurrers were sustained but one. Upon appeal to the Wisconsin Supreme Court, the trial court's overruling of the demurrer to the sixth cause of action was reversed. In its opinion the court stated:

> Charging a public officer with being inefficient and incapable in the performance of his duties of his office when the charge has some fair and reasonable basis in fact is not libelous. What constitutes efficiency and capability must always be matters of opinion. There are no absolute standards by which the conduct of public officials may be judged. * * *
>
> It is considered that the article in question does no more than to charge the plaintiff with constructing a ditch which in the opinion of the author creates an unnecessary hazard to human life, and, while the language used may be intemperate, the end sought is to arouse the public against permitting the construction of such ditches in Jefferson County by its highway commissioner, Mr. Grell, and not to bring Mr. Grell personally into public contempt and ridicule * * * The case is no doubt a close one and crowds the line between privileged and unprivileged publication. * * *

[55] 206 Wis. 187, 239 N.W. 428 (1931). [56] 238 Wis. 311, 298 N.W. 228 (1941).

> We feel that in doubtful cases the doubt should be resolved in favor of free criticism and discussion.[57]

The *Milwaukee Journal* published an article in which was quoted a statement made by the mayor of Sheboygan Falls, in part as follows:

> "Mayor Hoan travels around the country telling how well Milwaukee is governed," said the mayor of Sheboygan Falls. "Meanwhile the terrorists bomb Milwaukee's police stations and banks. Mayor Hoan himself is to blame for those bombings."

The Wisconsin Supreme Court, in its opinion affirming the dismissal of the complaint in the lower court, pointed out that a person of average intelligence and comprehension could not reasonably understand the meaning of the entire article to convey the meaning that Mayor Hoan was guilty of malicious destruction of property. "It is clear to us * * * that the statement that the mayor was to blame, referred not to any connection with the activities of dynamiters but as a criticism upon his law-enforcing activities, and in that respect was a fair comment." [58]

To call a person a pro-Nazi, a writer of a "yellow dog" contract, a man who labeled the Negro race as all fifth columnists, and an individual who intended to set himself up as a dictator proved costly to an eastern radio station, which had permitted its use for a political broadcast. It is understood on authority that the radio station settled the case out of court for $35,000 plus $17,000 costs including attorney's fees for all parties.[59]

The *Omaha Bee* commented on the operation of gambling devices in South Omaha as follows:

> It is announced by the official organ of the gamblers' gang that County Attorney Shields has complaints supported by irrefutable evidence that would convict some sixty owners of gambling devices who have been operating in South Omaha, but that he will not prosecute the criminals on condition that they offend no more. Is this not a beautiful state of affairs for a reform county attorney? It is reliably stated that the evidence has been at hand for weeks, that protected gambling was going on unmolested in South Omaha, but the county attorney would not interfere until after election, out of appre-

[57] Grell v. Hoard, 206 Wis. 187, 191–193, 239 N.W. 428, 430.

[58] Hoan v. Journal Co., 238 Wis. 311, 325, 298 N.W. 228, 234 (1941).

[59] Private correspondence verifying the facts of the case which was settled out of court.

hension that he might injure the chance of popocratic candidates. Now he openly proposes to pigeonhole the complaints and the evidence in deference to the interests of the gang. If, as is commonly reported, the South Omaha gamblers had to put up liberally for protection to run, how much have they had to put up to secure immunity from prosecution by Mr. Shields?

The supreme court affirmed the decision of the trial court for the plaintiff, stating that while it is permitted to discuss freely acts or omissions of public officials, the press has no right to defame the character of an official under the pretense of criticizing official acts.[60]

The *Detroit Evening Journal* published the following article regarding a deputy sheriff:

UNWARRANTED OUTRAGE

Danger of Walking Alone in Ecorse and Springwells

Michael Murphy's Experience

A Poor Man Nearly Reaches Friends, When He is Arrested and Imprisoned

Instances of the outrages practiced upon reputable people who may unfortunately pass through the township of Ecorse, by the justices and constables, keep coming to notice. Michael Murphy, who is employed upon a farm about a half mile from the village, upon the river road, was in the city this morning, and relates an event in which he took part. "One day last June," said Mr. Murphy, "an old man came along the road, and I fell into conversation with him. He said he came from the southern part of the State, and was going to Detroit, where he had relatives who would care for him. I invited him into the house, and gave him some dinner. In the afternoon the old man started out for Detroit. I had seen George Allen, a constable, who lives on Sand hill, watching the old man when he came to the house, so I kept an eye on him when he went up the road. The old man hadn't gone far when Allen started after him. I saw his game at once, and started towards

[60] Bee Pub. Co. v. Shields, 68 Neb. 750, 94 N.W. 1029 (1903).

them, but Allen got there first, and arrested the old man for being a tramp. We had a hot dispute, but, of course, Allen rushed his man off. The next day Allen took the man before Justice Haltiner, and he was sent up. That's the way these fellows get their fees, and it's an outrage. It's been going on for a long time." James Kelly, a farm laborer, who works near Mr. Murphy, was with him, and said these occurrences were common. "Just a little while ago," he said, "I was going to Ecorse, walking along the railroad. I had a bag on my arm, and guess I looked a little like a tramp. Allen came along, and stopped me, and asked me a number of questions. He concluded not to arrest me after that, but that was what he intended to do. The other day a man was walking along in front of the house, and Deputy-sheriff Bourreseau, who keeps a saloon in Ecorse, came along in his buggy. He asked the man if he didn't want to ride. The man got into the buggy, and rode towards the village. He saw something was wrong, and started to get out, when Bourreseau tried to prevent him. The man, however, jumped out, and pulled a jack-knife, when Bourreseau grabbed him. 'Let go of me, or I'll stick this into you,' yelled the man at Bourreseau, who released his hold. He called to some farm hands, who came and helped him put the shackles on the man. I don't know what became of him, but I suppose he was sent up. It isn't safe for an honest man, if he's a little ragged, or hasn't any money, to walk around Ecorse. These fellows hang around the highways, and arrest every one of them."

The decision for the plaintiff was affirmed by the supreme court which noted that the reputation of a public officer cannot be destroyed legally by false imputations upon his morals or his honesty.[61]

The following comment was published by the *Plattsmouth Evening News*:

> The question of the sheriff's fees in the Shepard case has been under discussion on our streets for several days, and having gathered some information from the county records, and from parties more or less familiar with the particulars, the News has the following to offer:
>
> On the 18th day of April Shepard was complained against for daylight burglary with intent to steal. The next day (Sunday) Mr. McBride went to Malvern, Iowa, and arrested him. Besides fees, known or admitted to be legitimate, he charged $15.00 "mileage" and $18.50 "expense." The legal fee for mileage for that distance is $2.30. The expense seems to be a fiction, created in the fertile mind of McBride himself. One item of this imaginary "expense" is $1.50 hotel bill. Shepard

[61] Michael Bourreseau v. Detroit Evening Journal Company, 63 Mich. 425, 30 N.W. 376, 6 Am.St.Rep. 320 (1886).

was not taken to a hotel by McBride, nor was he furnished any meals by him until the next day in the jail at the expense of the county. Mr. McBride, it appears, did not go to a hotel while in Malvern, but ate supper with Deputy Sheriff Bushnell of that town, on invitation, and even if he had done so the county would be under no obligation to pay the bill.

Another item of expense is "railroad fare for prisoner" $2.65. The C. B. & Q. railroad apparently took advantage of Mr. McBride's inexperience by charging him $1.96 too much, the regular fare being only 69 cents.

Another item is $1.50 for "livery." This must be pure "pad" as he hired no livery.

Still another item is $1.50 for "hack hire." This, if paid at all, was for a hack in Plattsmouth. Shepard was put into a hack upon his arrival here, without request, and driven two blocks to the jail. Such kindness to a prisoner in the matter of hacks is quite unprecedented, and was a McBride invention both in kindness and expense.

Shepard is charged with a daylight offense. Mr. McBride's transaction was a daylight effort, but here the parallel ends. Shepard is charged with "evil intent" but got nothing. McBride received a nice little compensation which was paid by the taxpayers of the county. Shepard is now under bond, awaiting trial, and may be sent to the penitentiary, while McBride is running for sheriff on his honesty and efficiency as a public official.

The supreme court affirmed the decision of the trial court for the plaintiff, stating in its opinion:

It is proper and right that the acts of public officials should be subject to criticism. It is one of the highest privileges of an active and impartial press to closely watch the acts of public officers, to praise where merit is due, and fearlessly and without favor to point out wherein such officers have failed to do their duty or have attempted to use their positions for private advantage, but this privilege granted to the press for the public welfare is not to be recklessly abused. Every man is entitled to be secure in his property, in his person, and in his reputation. * * * The liberty of the press and the rights of the individual must and do exist side by side.[62]

The *St. Louis Post-Dispatch* made the following comment:

IS IT A POLITICAL JUNKSHOP?

The special correspondent of the Post-Dispatch states upon authority of those having examined the Salmon Bank at Clinton, that the bank has been insolvent since November, 1903,

[62] Farley v. McBride, 74 Neb. 49, 54, 103 N.W. 1036, 1037 (1905).

when George M. Casey failed. Why was not the bank closed at that time? Why was it permitted to keep its doors open and receive the deposits of a confiding public? Major Harvey Salmon was a member of the Democratic State Central Committee, and the intimate, political friend of the machine leaders of the Democratic party. The bank's books were examined just before Ex-Secretary of State Cook went out of office, but no action was taken and the bank was left open to take the money of unsuspecting depositors. Is the damaging derelict a part of the political junk of the old "Democratic State Machine?"

The trial court's decision for the plaintiff was reversed in the supreme court on the ground that a public official's conduct is a matter of public interest and that a newspaper may comment fairly and honestly upon items and transactions which possess such interest.[63]

The *Milwaukee Sentinel* carried the following story:

MAYOR GOES "THE LIMIT" IN CLEANUP

Stevens Point Cowboy Executive in Lone Handed Reform

MAKES RAID ALONE

Dashes in Taxi to Hotel, Arrests Four for "Shooting Craps"

FIGHTS OLD MAN

Sustains Kicked Shins from City Controller, Aged 65

Stevens Point, Wis., Nov. 20.—(Special)—F. A. Walters, Stevens Point's doctor-cowboy-lecturer-mayor, is "going the limit—perhaps beyond the limit," to clean up his city. He said so Monday morning.

Already he has gone a long way toward "the limit." He has gone as far as participating in raids on alleged gambling

[63] Cook v. Pulitzer Pub. Co., 241 Mo. 326, 145 S.W. 480 (1912).

joints and alleged illegally operated saloons, employing detectives from out of town, threatening suits against the newspaper of the city, personally arresting two men in a hotel, and openly stating his intention of obtaining dismissal of the chief of police.

Mayor Walters' home was in Fond du Lac. Then he went out West and was a cowboy. When he came back, it was as a homeopathic doctor, but he retained, like Chicago's wild and woolly mayor, traces of his rough-and-ready career on the cattle ranges in the form of a sombrero and other "trimmings." For twenty-five years he lived here and at Wausau, Wisconsin. Then four years ago he was elected mayor. After three years in that office he was defeated for re-election by L. P. Pasternacki, Polish dentist. At the last election Mr. Walters was candidate again and was elected for his fourth term.

Adopts Drastic Program

Then he started his trip toward "the limit."

"The townspeople insinuated that things weren't run the way they ought to have been run when I was mayor before," he said, "so now I'll show them that I can run things strictly.

"We've got the cleanest little city in the state. But there are a few gamblers and sports here who have been living on the community for years. It's time for them to go."

So, shortly after his inauguration, he issued warning that gambling ordinances and the Sunday-closing law would be enforced to the letter. He started with the automobile tail light and the traffic laws.

Presently, detectives appeared in Stevens Point. Then one Sunday morning the mayor personally assisted in raiding an alleged gambling resort over a saloon. Four men were arrested. One of them, "Candy Pete" Mosel, was charged with running a gambling house, and another, Tom Leonard, with being a gambler. Next *Mayor Walters* and his purity squad raided the premises of the tailoring shop of Walter Glinski and arrested John Kutella on the charge of selling liquor on Sunday. The mayor's evidence sought to establish that there was a "posted men's club" in the city through which the men on the blacklist were furnished with liquor.

Women Indorse Him

About this time the mayor began to reap the rewards of the reformer. The Stevens Point Women's Club and a mass meeting of 300 citizens in the Baptist Church passed resolutions indorsing him.

But opposition developed also. The mayor criticized Chief of Police John S. Hofsoos and tried to obtain dismissal of Patrolman Jadd Chenevert. But the police and fire commission refused to back him up.

He charged that a new $20,000 sewer project was not being inspected properly by the board of public works. When the board of public works resented this criticism, the city council abolished the board and put its work into the hands of a committee of its own members. The board of public works, however, had friends. One of them was George Rogers, sixty-five years old, city controller and former mayor. The mayor became involved in an altercation with the aged official. They clinched. The cowboy mayor had Mr. Rogers by the chin and arm, and Mr. Rogers had scored several kicks upon the mayor's shins. Then the rest of the city administration separated the antagonists.

Politicians Line Up

Some time later a committee of citizens waited upon Dr. Pasternacki, Mayor Walters' predecessor, and asked him if he would be candidate for mayor at the next election. Both the Stevens Point Daily Journal and the Weekly Gazette published the news, omitting the names of the committee. Whereupon the publishers were visited by Attorney A. L. Smongeski, who said that unless they divulged the names of the committeemen they would be sued for libel. Saturday night was their last hour of grace, but by 10 o'clock Monday morning no papers had been served on the publishers.

Meanwhile the chief of police had caught the reform fever and had caused two arrests. The mayor appeared in court asking the dismissal of both actions stating that one of the saloon keepers, Winn Cowelsok, had kept open late to furnish liquor to a sick man, and that the other liquor dealer, John Lukaszewicz, had kept his place open because he was compelled to by four customers. The cases were dismissed.

Makes Dramatic Raid

Friday afternoon Mayor Walters received a tip that gambling was going on in the Soo Hotel on the south side of the city. He leaped into a taxicab, sped southward, dashed into the barroom, whipped out his trusty revolver, and arrested four men. He charged them with shooting craps. They were arraigned on Saturday, but the case was dismissed for insufficient evidence.

On Monday morning Stevens Point was prepared to watch the trial of Leo Boyanowski, charged with being keeper of a gambling joint. The outcome of the trial will determine the result of one of the mayor's raids. The other cases will follow.

But besides that, Stevens Point was prepared for almost anything. The mayor has promised that, within a week or ten days, he will have new evidence pertaining to the dismissal of Chief of Police Hofsoos. And furthermore, he has promised that he "will go the limit—perhaps beyond the limit."

The jury returned a verdict for the plaintiff,[64] based upon the following:

> (1) That a person of average comprehension, upon reading the article, would have understood that it was therein stated and charged that the plaintiff attacked and assaulted Mr. Rogers; (2) that such statement and charge was, in substance, not true; (3) that a person of average comprehension, upon reading the article, would have understood that it was therein stated and charged that the plaintiff, Dr. Walters, had not obtained a proper medical education, training, or diploma and that he was a quack doctor practicing as such; (4) that a person of average comprehension, upon reading the article, would have understood that it was therein stated and charged that the plaintiff was performing his duties of mayor of said city of Stevens Point in a ridiculous, foolish, and silly manner and was a subject of ridicule and contempt; (5) that said statements and charges were in substance, not true; (6) that the article published, taken as a whole, was not a fair comment on the acts of the plaintiff in his capacity as mayor of the city of Stevens Point; (7) that the defendant was not actuated by express malice in causing said article to be published; and (8) damages $4,000.

In its opinion the court stated:

> In some jurisdictions it is held that all matters, true or false, having a bearing on the fitness of a public officer or candidate for public office may be published, without liability, if it be shown that they were published without malice, in good faith, and in the honest belief that the facts stated were true. Here the immunity is not so sweeping. While the citizen may speak plainly, indulge in extravagant expressions and caustic and severe comments, if the facts warrant, concerning the fitness, qualifications, and official conduct of men in whom he is interested as a citizen, he cannot do so in disregard of the facts. He cannot malign, falsify, insult, or hold up to public hatred, contempt, or ridicule unless his statements be warranted by the facts. * * *
>
> An insignificant proportion of its circulation is within the city of Stevens Point, the only place where its readers had a legitimate interest in the official conduct of the mayor of the city * * * The general rule deducible from the authorities may be stated to be: If a newspaper, published primarily for a given constituency, such as county or state, church or lodge, have a small circulation outside such constituency, it is not deprived of its privilege in the discussion of matters of concern to its constituency because of such incidental outside circulation.[65]

[64] Walters v. Sentinel Co., 168 Wis. 196, 200, 169 N.W. 564, 566 (1918).

[65] 168 Wis. 196, 202–204, 169 N.W. 564, 567.

§ 67. COMMENT ON PUBLIC OFFERINGS

Any artistic presentation, play, musicale, exhibition, book, magazine article, product, or service offered to the public for its support may be freely criticized or even ridiculed provided such criticism is founded upon facts and is not malicious.

Any play, musical comedy, motion picture, radio entertainment, or lecture that is offered to the public may be subject to severe and negative criticism on the condition that the comment is fair and that the facts upon which the criticism is based are true.

In this class of cases, the courts are not always discriminating in the distinction between qualified privilege and fair comment, a distinction that is based on sound legal doctrine, although both of these defenses are sometimes classed together. The basic legal theory upon which a theatrical production may be criticized is fair comment, rather than qualified privilege. If a play is offered to the public and invites the public's support, anyone has a right to criticize the play, notwithstanding the fact that such criticism may so injuriously affect the attendance that the play will be a financial failure.

Cherry v. Des Moines Leader [66] is a classic case of seemingly extreme criticism. The publication on which this suit for libel was brought follows:

> Billy Hamilton, of the Odebolt Chronicle, gives the Cherry Sisters the following graphic write-up on their late appearance in his town: "Effie is an old jade of 50 summers, Jessie a frisky-filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailing of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the *danse du ventre* and fox trot,—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle."

The legal principles upon which the Cherry Sisters case was decided were given by the court as follows:

[66] 114 Iowa 298, 86 N.W. 323, 54 L. R.A. 855, 89 Am.St.Rep. 365 (1901).

> One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guaranteed to dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even, may be used, if based on facts, without liability, in the absence of malice or wicked purpose. * * * Ridicule is often the strongest weapon in the hands of a public writer; and, if fairly used, the presumption of malice which would otherwise arise is rebutted, and it becomes necessary to introduce evidence of actual malice, or of some indirect motive or wish to gratify private spite.[67]

It has been held that the following are the subject of fair comment and criticism: A book and its author's views; [68] manager of an Italian opera; [69] clergyman in his ministerial duties; [70] teacher of stenography who advertised for pupils; [71] projector of railway and his work; [72] "The Cardiff Giant," a stone image of a man, exhibited to the public; [73] a public dinner served by a caterer; [74] a public building being erected by the city; [75] a flower show.[76]

Considerable liberality in commenting on social phenomena is recognized by the law. Activities that engage public interest are fitting subjects for even adverse criticism though such criticism injures individuals and may lessen their income or positions. Athletic sports, for example, have a universal interest; thousands are followers of particular amateur or professional teams. When these sports and particularly sports organizations bid for public support, they become fitting topics for discussion. A newspaper commentator may say for example that A as manager of the Cubs baseball team is a sorry field general, who had little seem-

[67] 114 Iowa 298, 304, 305, 86 N.W. 323, 325, 54 L.R.A. 855, 89 Am.St.Rep. 365.

[68] Cooper v. Stone, 24 Wend., N.Y., 434 (1840); Dowling v. Livingstone, 108 Mich. 321, 66 N.W. 225, 32 L.R.A. 104, 62 Am.St.Rep. 702 (1896); Triggs v. Sun Printing & Publishing Ass'n, 179 N.Y. 144, 71 N.E. 739, 66 L.R.A. 612, 103 Am.St.Rep. 841, 1 Ann.Cas. 326 (1904).

[69] Fry v. Bennett, 28 N.Y. 324 (1863).

[70] Shurtleff v. Stevens, 51 Vt. 501, 31 Am.Rep. 698 (1879).

[71] Press Co. v. Stewart, 119 Pa. 584, 14 A. 51 (1888).

[72] Crane v. Waters, 10 F. 619 (C.C. Mass.1882).

[73] Gott v. Pulsifer, 122 Mass. 235, 23 Am.Rep. 322 (1877).

[74] Dooling v. Budget Pub. Co., 144 Mass. 258, 10 N.E. 809, 59 Am.Rep. 83 (1887).

[75] Bearce v. Bass, 88 Me. 521, 34 A. 411, 51 Am.St.Rep. 446 (1896).

[76] Green v. Chapman (1837) 4 Bing. 92, 132 English Reports 724.

ing control of his players in their trip on the eastern circuit in which seven straight games were dropped; such a comment in light of the fact that the team may have lost more than half of its games in the first half of the season would be fair comment, provided of course, that there was no malice in this attack upon the manager.

Football which has captured the popular imagination receives caustic comments particularly when favorites are defeated; players and coaches are criticized, and hints given that the alumni of a particular university are aroused against the athletic directors and coaching staff. A notable case concerning a football coach is Hoeppner v. Dunkirk Printing Company.[77] The *Dunkirk Evening Observer* severely criticized the playing of the high school team of that city, in the following story:

COACHING SYSTEM CONDEMNED FOR TERRIFIC LACINGS GIVEN DUNKIRK HIGH FOOTBALL TEAM

Squad has Abundance of Latent Ability Which Has Not Been Brought out by Proper Drilling—Lack Fundamental Knowledge of Game—Plays and Formations are Antique

The terrific drubbing handed the Dunkirk High School football team by Warren on last Saturday afternoon, following hard on the North East setback of the previous week, has swung the vast group of local "bleacher coaches" into vocal activity and innumerable remedies have been suggested as a means of eradicating or at least subjugating some of the more apparent faults displayed by the Maroon eleven.

Lack of knowledge of the fundamentals of the game, low morale particularly when the "breaks" are going against them, paucity of plays furnished, antiqueness of plays and formations being used, the lack of a modern coaching system and other causes too numerous to mention have been enumerated by the dopesters in their indignant discussions following last Saturday's slaughter.

It is interesting to note here that no one offered "lack of material" as the reason for Dunkirk's dismal showings, thus far this season, the consensus of opinion being that the squad this year is the best since the days of Hub Henning, "Ollie" Weigle and Leo Kornprobst.

[77] 254 N.Y. 95, 172 N.E. 139, 72 A. L.R. 913 (1930).

Squad Needs Good Drill

That the Hoeppner-coached squad is in dire need of a good drill in the rudiments of the game was apparent to even the casual spectator at last Saturday's contest. The work of the local youngsters in catching punts, blocking and charging, and particularly in tackling was slip-shod and demonstrated a lack of knowledge. On an astonishing number of plays the Warren balltoter would be "tackled" by three or four Dunkirk players before he was finally brought to earth after gaining 10 to 15 yards more than he should have. This dainty manner of tackling was also displayed in the North East game. Three Warren punts were fumbled about by Dunkirk receivers and other kicks were juggled and almost lost. As for the line charging and interference for the ball carrier—nothing much can be said for that.

No Diversity of Plays

The fact that the same five or six plays are used constantly throughout the game by Dunkirk makes things much easier for the Maroon's opponents and after the first few minutes the visitors know in exactly what direction to look for the action. On some occasions when the team has played Dunkirk several preceding years even the above mentioned few minutes are not necessary. A local quarterback of quite a few seasons back recently made the remark that he believed he could run this year's team, as the plays this season looked to be the same ones his outfit used at the high school in the dim and dusky past.

Perhaps some one will claim that the old plays and formations still work. They do sometimes—North East used the old Statue of Liberty play here successfully and Warren dug the shoe string play out of its grave and failed only because of a poor pass to the "sleeper" near the sidelines. However, an alert, well-coached team would smother plays of this sort before they were well started.

Team Has Latent Ability; Must Be Brought Out

The 1928 Dunkirk High School football team has the latent ability to play a brilliant game as they conclusively showed during the first period of the North East game. A flashy, speedy backfield behind a heavy, fast line ripped the opposition to pieces during the first few minutes. When the tide turned and North East scored, the local team's play gradually crumpled into a mere shadow of what it had been. They just didn't seem to know what to do next.

Against Warren the Maroon team showed its hidden power but only for very brief spurts.

The local followers of the game—and there are many—are wondering why the wealth of material on this year's team is not used to the greatest possible advantage; why the natural ability of many members of the Maroon squad is not polished

> up and improved upon through a thorough, intelligent and modern coaching system so that when out-of-town schools book the local high, they will be scheduling a game with a feared and worthy adversary rather than merely arranging a practice workout as has been the case in recent years.

It was held that the comment was fair unless the coach could show evidence of actual malice. Said the court:

> Any one who has attended a college baseball or football game has experienced the keen enjoyment and satisfaction which the spectators take in shouting advice and criticism to the players. It is impossible to disassociate a sport contest of any magnitude from public criticism, hero worship and excuses for defeat. The chief reason why sports make an appeal to the American public is because they afford an outlet for pent-up feelings and enthusiasm. Sport is the safety valve which prevents us from blowing up through other and more dangerous forms of excitement. It does much to keep the body politic in a healthy and happy frame of mind.
>
> When the plaintiff assumed the position of physical instructor and coach to the football team of the Dunkirk High School, he was no exception to the habits and customs which have become a part of the game. His work and the play of his team were matters of keen public interest; victories would be heralded, defeats condemned. * * * He is paid out of the public treasury, holds a semi-official position, and trains the boys for public exhibition and contest. Any honest comment or criticism on his ability in these particulars is not libelous. If the facts be truly stated, an opinion of his capacity drawn from these facts, if it be fair and honest, may be given by the newspaper to the public without fear of a damage suit.[78]

When an author publishes a book or magazine article, he invites the public not only to purchase and read the book or the magazine containing the article, but also to express their opinion of the particular literary work. What is true of a book is likewise true of any painting, photograph, design, print, or product that is offered to the public. So long as the criticism is based on facts and does not attack the character or personal life of the author, it is considered fair criticism.[79] The author in publishing a book commits himself as an author to the public's judgment.

The test of a criticism is primarily good faith and honest conviction. If a critic attacks the literary merits of a book, its rhetorical style or its conclusions, or its value for the purpose for

[78] 254 N.Y. 95, 98, 99, 105, 172 N.E. 139–141, 72 A.L.R. 913.

[79] Dowling v. Livingstone, 108 Mich. 321, 66 N.W. 225, 32 L.R.A. 104, 62 Am.St.Rep. 702 (1896).

which the work was published, he is not guilty of libel when such criticism is *bona fide*.

The *Sunday Herald* of Boston published the following criticism of the Cardiff Giant:

> The sale of the Cardiff Giant, so called, at New Orleans, for the small price of eight dollars, recalls the palmy days of that ingenious humbug. We well remember the learned remarks made by the connoisseurs in this city when it was exhibited in a vacant store quite near our office. While the vulgar herd only looked on in silence, seeing a colossal figure which excited their curiosity, but which they did not attempt to explain, the Harvard professors and other learned men traced its pedigree by their knowledge of artistic history, and constructed theories as to its origin, which at once displayed their erudition, and helped to advertise the show. But our professors and learned men were not the only victims of the sell.
>
> A distinguished professor of Yale discussed learnedly upon it in the Galaxy Magazine. He demonstrated beyond a doubt that the statue was authentic, that it was antique, and that it was a colossal monolith. He ciphered it down that it was a Phoenician image of the god Baal, and found no difficulty in proving to his own satisfaction that it was brought to America by a Phoenician party of adventurers, who sailed in one of the ships of Tarshish, and that it was buried by the idolaters to save it from desecration by the hordes of savages who overpowered and destroyed the Phoenicians. He accounted for several marks and symbols upon the image, which were unmistakably Phoenician. Not long afterwards the man who brought the colossal monolith to light, confessed that it was a fraud, and the learned gentlemen, who had indorsed its authenticity, were left as naked as the statue itself.

Suit was brought for a trade libel against this piece of personal property. The trial court found for the defendant, the plaintiff excepted, and the Supreme Judicial Court of Massachusetts sustained the exceptions.[80] It was averred that the statue had never been in New Orleans and had never sold for $8; and that the publication of the story prevented the sale of the statue for $30,000. The court, in sustaining the exceptions of the plaintiff, pointed out that the jury probably decided for the defendant on the ground that the writer of the story had not intended to cause injury thereby. It noted also that malice need not be intended; it is sufficient if there has been such reckless disregard of the truth and possible consequences of such disregard.

[80] Gott v. Pulsifer, 122 Mass. 235, 23 Am.Rep. 322 (1877).

When words, of which complaint is made, are susceptible of being regarded as a criticism of an artist's work, they are not libelous *per se* unless the complainant shows through innuendo that the words were particularly damaging to him. Outcault v. New York Herald Co.[81] illustrates this principle. For some period the *Herald* had used Outcault's cartoon, "Buster Brown" and then decided to drop this newspaper feature. The *Herald* in advising its readers about this change stated:

> **Buster Brown's Career**
>
> All things have their period of growth, flower, and decay, even the subjects chosen by writers and illustrators contributing to the comic section of the Sunday newspaper.
>
> Readers of the Herald's European edition have been expressing dissatisfaction with recent numbers of the "Buster Brown" pictures. A letter to the editor—reproduced in a special cable despatch on another page—explains to the grumbling children that Mr. Outcault has evidently run out of ideas, and, unlike Mr. Gibson, is not willing to attempt something new.
>
> The European edition has provided its readers with the new and exceedingly amusing little pet "Nemo" and other illustrated features for its weekly comic section, and their popularity more than compensates for the waning interest in "Buster Brown."

In the lower court Mr. Outcault was successful when the court overruled the defendant's demurrer; however, the appellate division of the supreme court reversed the judgment of the lower court, granting leave to the plaintiff however to file an amended complaint.

It is not necessarily libel for a newspaper to state in its comment that a particular artist's work in a definite case, as offered to the public, is bad so long as the comment does not attack maliciously the artist personally or criticize his private life. It was stated in Battersby v. Collier:[82]

> However skillful an artist may be, it is not libel upon him to say that any particular picture of his is not good of its kind. The same rules must be applied to persons in that profession as apply to persons in every other profession, and nothing can be said to be libelous of a man in his profession except something which degrades or lowers him in his professional character generally, and it is not a libel of one in that regard to say that in any particular work he has fallen below the proper standard or has made a failure.

[81] 117 App.Div. 534, 102 N.Y.S. 685 (1907).

[82] 34 App.Div. 347, 54 N.Y.S. 363, 368 (1898).

CHAPTER 12

PRIVACY

Sec.
68. Development of Privacy.
69. Privacy a Right of Seclusion.
70. Judicial Recognition of Privacy.

§ 68. DEVELOPMENT OF PRIVACY

Recognition of injuries to personality, although not recognized separately as such at common law, indicates adjustment of law to human needs and necessities.

As the law has gradually developed to meet human needs, so the development of the law of privacy is marked in juridical thinking, particularly from the close of the nineteenth century. Early common law knew no such separate legal category as privacy; however, there were traces of privacy under the cloak of other legal areas. Modern conditions, with inquiring reporters and candid cameras as well as ambitious managing editors and a popular hunger for the intimate, have drawn from judicial minds in numerous quarters recognition of the need for protection of persons in their seclusion and in their desire to avoid embarrassing realism in the use of their names or personal photographs. Few states recognize privacy, but courts have increasingly recognized privacy problems in dealing with written defamation, common law copyright, breach of confidence, violation of contract, and disorderly conduct.

The right of privacy, though not legally recognized as such, has been tacitly enforced by the *mores* of certain peoples, good taste, and immemorial custom. In Gokal Prasad v. Radho,[1] there may be seen the type of custom given recognition under Indian law. The court stated:

> In my opinion, the fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be in India an usage or custom of privacy valid in law. The conditions of domestic life in the two countries have from remote times been essentially different, and in my opinion it is owing to that difference in the

[1] Gokal Prasad v. Radho, Ind.L.R., 10 Alla. 358, 385 (1888).

> conditions of domestic life alone that a custom which appears to me to be a perfectly reasonable one in India should be unknown in England. In India, or at any rate in these Provinces, the custom of the *parda* has for centuries been strictly observed by all Hindus except those of the lowest castes, and by all Muhammadans except the poorest. It cannot be doubted that the male relations of a *parda-nashin* woman and the woman herself would consider it a disgrace were her face to be exposed to the gaze of male strangers, and whilst that is the view of those amongst whom the custom of the *parda* prevails, I think it is more reasonable that a neighbour should not be allowed to erect new buildings or to open or extend doors or windows in old buildings in such a way as would substantially interfere with those parts of his neighbour's house or premises which are used by *parda-nashin* women of the latter's family than to hold that the latter's only remedy is to build a wall on his own land, which, although it would maintain his privacy, might deprive his house of light and air and render it uninhabitable, or to screen his windows with probably the same result. We know as a matter of common knowledge that in these Provinces great numbers of *parda-nashin* women in the hot weather are, I may say, compelled, from the severity of the climate, to sleep in the open air, that is, either in the courtyards or the verandahs of their houses. In such cases, where the privacy in fact exists and is or has been enjoyed, I can see nothing unreasonable in a custom that such privacy shall be protected.[2]

Whether Anglo-American jurisprudence will extend its meager appreciation of the problem remains for the future to determine. The struggle for freedom of the press symbolizes clearer evaluation of human rights; when these rights over-step to the injury of human personality, there would seem need for further protection of personal existence and identity. To violate personality may be a breach of the right of liberty of the press.

Vanderbilt v. Mitchell [3] might be taken as an outstanding case involving what might be termed right of privacy and the use of equity to give relief in peculiar circumstances. It must be stated, however, that the case was decided upon well recognized grounds of equity jurisprudence.

The facts show that the complainant was the husband of Myra L. J. Vanderbilt, but that from September 1901 to July, 1903, the wife and a third party lived together in adultery and that during that period the complainant had no matrimonial access to his wife; further, that as a result of adulterous intercourse there was born to the wife a male child, and by her named William

[2] Ibid. at 385.

[3] 72 N.J.Eq. 910, 67 A. 97 (1907).

Godfrey Vanderbilt. The bill of complaint charged that the wife, upon the birth of the infant, falsely stated to the attending physician that the complainant was the father of the child, and that the child was the lawful issue of the marriage between herself and the complainant, and that she made these false statements to induce the physician to insert them in the birth certificate, which was duly filed with the bureau of vital statistics.

It was further shown in the bill of complaint that there existed a testamentary trust created by the mother of the complainant, by the terms of which certain real property in the state of New York was vested in trustees and that the complainant received an income therefrom during the lifetime of his nephew and niece and that at the death of this nephew and this niece the corpus of the estate was to be distributed to certain persons, including the complainant if alive and otherwise to his lawful heirs or devisees.

In the original suit a demurrer was sustained to the complaint, but upon appeal this decree was reversed. It was declared by the court that the complainant was entitled to be relieved of the fictitious status of fatherhood so far as the certificate in question created *prima facie* evidence so as to impose upon him both present and future burdens. The question determined by the court was not the paternity of the child, but rather the destruction of the evidence of the birth certificate and the prevention of its use as a public record so as to injure the good name and financial liability of the complainant.

§ 69. PRIVACY A RIGHT OF SECLUSION

This right is not recognized by some jurisdictions though relatively the violations of privacy are appreciated by the courts especially when protection can be given on other legal bases, such as defamation, property, or breach of confidence.

Privacy is a limitation upon the right to report and publish in those jurisditions in which privacy is recognized either by legislative enactment or judicial decision.

Privacy is the right of seclusion as to one's person, name, or representation of self. Early conceived as the right to be let alone,[4] privacy implies the privilege of withdrawing to a degree from society; it does not mean that one to enjoy the right of

[4] 50 C.J. 369—Privacy is "the state of being in retirement from the company or observation of others."

privacy loses his social, political, or occupational rights. It exists in relation to these other rights. Violation of privacy is a type of trespass. Likewise, it might be regarded as a property right especially in the use of one's name or representation of self.

One may be regarded as free in the use of his person, his name, his time; his right to life, liberty, and property may not be taken from him without due process of law. One cannot escape however certain obligations by merely claiming immunity therefrom under the cloak of a right of privacy.

The fundamental document announcing and justifying the separation of the American colonies from Great Britain, that is, the Declaration of Independence, asserts certain self-evident truths to the effect that men are endowed by their Creator with certain unalienable rights and that among these are "life, liberty, and the pursuit of happiness."

From the very nature of the document it may be assumed that these rights though individual in character are predicated upon the place of the individual in an organized society. Each individual, though asserted to possess these rights of life, liberty, and the pursuit of happiness, is as a member of a social unit, political in nature, and termed, the government. The rights of the individual as such do not transcend the rights of the government of duly organized individuals; neither do these individual rights permit such exercise that they encroach upon similar rights of other individuals in the same political organization.

While the common law did not take cognizance of the so-called right of privacy as such, it did provide certain remedies which would protect the privacy of a person under certain conditions. For example, Blackstone is authority for the definition of eavesdroppers as persons who "listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales"; at common law the eavesdropper was a public nuisance.[5] Under criminal law today, either the eavesdropper or the window peeper could be prosecuted for disorderly conduct, and, if such person went onto private property without right he could be prosecuted for trespass. The offense known as malicious mischief might also include certain acts appertaining to what might be termed privacy.

In Pavesich v. New England Life Ins. Co.,[6] the court stated:

[5] 4 Blackstone (1st Worcester ed.) 168 (1790).

[6] 122 Ga. 190, 194, 219, 50 S.E. 68, 69–80, 69 L.R.A. 101, 106 Am.St.Rep. 104 (1905).

> The right of privacy has its foundations in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. * * * The conclusion reached by us seems to be so thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law, and so thoroughly in harmony with those principles as molded under the influence of American institutions, that it seems strange to us that not only four of the judges of one of the most distinguished and learned courts of the Union, but also lawyers of learning and ability, have found an insurmountable stumbling block in the path that leads to a recognition of the right which would give to persons like the plaintiff in this case, and the young woman in the Roberson case, redress for the legal wrong, or what is by some of the law writers called, the outrage, perpetrated by the unauthorized use of their pictures for advertising purposes.

The growth of the common law has been emphasized in sustaining the theory of *ubi jus ibi remedium,* or there is no wrong without a remedy. This action led to the invention of action on the case, one of the common law actions. It is pointed out by Broom that "The principle adopted by the courts of law accordingly is, that the novelty of the particular complaint alleged in an action on the case is no objection, provided that an injury cognizable by law be shown to have been inflicted on the plaintiff; in which case, although there be no precedent, the common law will judge according to the law of nature and the public good." [7]

As pointed out by S. D. Warren and L. D. Brandeis, in an article on the right of privacy, in an early edition of the Harvard Law Review,[8] the law has grown to recognize not only physical injuries but a newer injury to sensations. There was a remedy to a battery, but as the law grew a remedy was provided to punish a threat of injury, or an assault. Conception of injury evolved from the mere protection of bodily injury to penalize defamation and alienation of a wife's affection. The

[7] Broom, Herbert, Legal Maxims (9th ed), p. 132, and authorities cited.

[8] 4 Harvard Law Review 193 (1890).

concept of property was enlarged to give protection to intellectual property. So with a need arising in human society to protect a person's individual feelings and his desire to pursue life free from abstractions of prying news mongers, there is reason why some recognition should be given generally to the right of privacy.

The theory that there is no wrong without a remedy is not without limitation. In certain cases there may be no remedy because there is no type of action provided that would fit the particular circumstances. In the social intercourse of life, there are many types of instances in which one's feelings may be hurt, or in which one may be disappointed in his expectancy or forecast of certain results in social life or business; ordinarily, there would be no legal redress. A friend might make a remark that to third persons would be quite harmless, but to the person addressed the remark might be sarcastic, very offensive; such a remark would afford no legal redress; clearly it would be *damnum absque injuria,* or loss, detriment, or damage without wrong for which there would be no legal remedy.

Violation of personality (privacy) is without question a wrong, but in many jurisdictions the wrong is not given legal remedy. How far American jurisprudence will go in trying to solve this complex problem is beyond the boundary of this study. Naturally, if for purposes of publicity, one wishes to sacrifice his seclusion, that is his own concern, but for the individual who does not seek publicity but who frequents public places and mingles with society, some sacrifice of his seclusion is necessarily made. Common law copyright and the law of contract govern innumerable cases of violation of both letters and photographs, as in the case of photographs that are not released for publication, and materials, text or photographs, governed by previous contract between the parties. The law of libel governs defamation in print; and the law of trespass governs invasion of property whether the purpose of the invasion is to gather news for a story or otherwise. These are certain controls that govern violation of the so-called privacy, irrespective of whether there is statutory or judicial recognition of such a right.

Clearly the modern law of the air has evolved some new concepts and problems. The old idea that an owner of real property controlled both from the surface to the center of the earth and from the surface to the heavens can hardly be tenable in this age of increasing navigation in the air. In the days of

Blackstone journalism was in its infancy; there were no tabloid newspapers, no distribution of photographs by means of wire, no gigantic circulations. The modern era has witnessed all these developments, together with increasing competition for news, personalized feature stories, and intimate photographs. The boundaries of the individual's exclusiveness have been penetrated; how far the right to report, in the public prints, intimate details of another's life, presents a problem that has puzzled students of jurisprudence. The social need for some limitation upon invasion of personal rights has seemed to present an urgency that cannot long be refused.

How far the freedom to proselyte may interfere with the privacy of the home was a question raised in cases concerning Jehovah's Witnesses, decided by the United States Supreme Court early in 1943. Numerous municipal ordinances regulating the distribution of handbills and the licensing of book agents were tested and found constitutional. There were several strong dissenting opinions, however. On Palm Sunday, 1939, more than 100 Witnesses descended upon one town, and proceeded to call upon householders, offering to play phonographs and to sell religious books and pamphlets. In some cases, calls were made upon members of the Catholic church who in several instances were insulted by having their church obscenely denounced and called a racket.

Ordinances of the type considered by the court may be justified on the ground of protection of householders from intrusion upon hours of rest and the prevention of crime. "Constant callers, whether selling pots or distributing leaflets," stated Justice Black in Martin v. City of Struthers,[9] "may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard which zoning ordinances may prohibit." "Door-knocking and bell-ringing by professed peddlers of things or ideas may therefore be confined within specified hours and otherwise circumscribed so as not to sanctify the rights of these peddlers in disregard of the rights of those within doors," stated Justice Frankfurter in a concurring opinion of the same case.[10] It is submitted that such intrusions may seriously interfere with the doctrine that "a man's home is his castle."

The right of privacy may be termed akin to the rights of personal security and personal liberty. Personal security is

[9] 319 U.S. 141, 63 S.Ct. 862, 864, 87 L.Ed. 1313 (1943).

[10] 319 U.S. 141, 63 S.Ct. 862, 868, 87 L.Ed. 1313.

largely physical in concept; none the less important is the right of liberty, the right to be permitted to use one's natural faculties. The right of civil liberty transcends to a degree the right of liberty, for under the civil organization of society, liberty is restricted to the relative exercise of similar rights by other individuals.

Cooley takes the position that privacy is more properly a personal than a property right.[11] The theory that privacy has some of its roots grounded in the right of property is however well supported in numerous leading cases.

In Munden v. Harris,[12] the court stated:

> It may be admitted that the right of privacy is an intangible right; but so are numerous others which no one would think of denying to be legal rights which would be protected by the courts. It is spoken of as a new right, when in fact it is an old right with a new name. Life, liberty, and the pursuit of happiness, are rights of all men. The right to life includes the pursuit of happiness, for it is well said that the right to life includes the right to enjoy life. Every one has the privilege of following that mode of life, if it will not interfere with others, which will bring to him the most contentment and happiness. He may adopt that of privacy, or, if he likes, of entire seclusion. The face of the majority opinion in Roberson v. Rochester Folding Box Co., supra, while denominating the right of privacy as "a phrase" and "a so-called right", yet concedes that it is a something which to disturb is an "impertinence." The court recognizes the right, but, as has been already said, not considering it a property right, refused it the protection of the restraining power of a court of equity; and thereby confined the beneficent power of equity within too narrow bounds—bounds so limited as will permit the doing of acts which shock the moral sense.
>
> We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right of material profit. We also consider it to be a property right of value, in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty; and that novelty of the claim is no objection to relief. If this right is, in either respect, invaded, he may have his remedy, either by restraint in equity, or damages in an action at law. If there are special damages, they may be stated and recovered; but such character of damage is not necessary to the action, since general damages may be recovered without a showing of specific loss; and if the element of malice appears, as that term is known to the law, exemplary damages may be recovered.

[11] Cooley, Thomas M., Torts (Throckmorton ed), p. 391 (1930).

[12] 153 Mo.App. 652, 659, 660, 134 S. W. 1076, 1078 (1911).

The concept "property" has come to mean every form of possession, tangible and intangible.[13] In light of this view, the right of liberty may be regarded as an intangible property right. It is to the economic advantage of an individual to be free in the exercise of his person. His personality is his own. While one must contribute of his personality, if he is to take part in society and its consequent relations, he has the right to withdraw into a secret place and stay there so long as he can sustain himself and meet his obligations to government.

Privacy is closely akin to common law copyright in the protection of private thoughts, plans, and writings.

At the common law an individual is entitled to retain his own thoughts and sentiments as his intellectual property so long as these thoughts are not reduced to writing and published. If, on the other hand, the thoughts are reduced to writing and published with *the author's consent,* the common law copyright is lost; if the author wishes to receive the benefit of his writings, he may of course comply with the requirements of statutory copyright and for a period of 28 years enjoy exclusive right to his writings, with a renewal privilege for an additional 28 years.

Whether the right to one's personality, to the exclusive right to control information concerning his own personal habits and affairs, may by analogy or inference, or otherwise, be considered a division of the law of common law copyright is a question.

Clearly there is a common law copyright, running to the subject or to the person who buys the services of a photographer to make a picture of another, provided of course, that such common law copyright would not obtain as to the subject when the subject's picture is taken in a public place; an example of the latter type of case would be the photographing of a prominent financier emerging from his office on Wall street upon the public thoroughfare.

As the principles of privacy are still in the process of formation, especially in application to modern life, it is necessary to give some attention to some types of problems that arise in journalistic activities. The enterprise of the press, particularly in obtaining news and photographs, raises difficulties which

[13] 4 Harvard Law Review 193 (1890).

often involve infractions of this so-called right. Let us take a hypothetical case. The newspapers in a large port city are advised that a prominent foreign motion picture star is arriving on her way to Hollywood. When this star reaches port, the ship reporters, photographers, and dramatic critics find that the star refuses to be interviewed or to be photographed. She leaves the ship heavily veiled and registers in an exclusive apartment hotel, continuing to refuse to see newspapermen. While at the hotel, the star leases the penthouse so that she will be free to take sun baths, a fact which the newspapers learn through the servants in the hotel.

The tabloid newspapers are especially eager to obtain pictures of this star who has charmed foreign dictators and who once had Paris at her feet. One photographer for a "tab" decides to obtain her picture at all costs. He observes that from one particular skyscraper some blocks away he can obtain a view of the sun deck of the penthouse apartment. With the use of a telescopic lens, he obtains a vivid photograph of the star, practically nude, taking her sun bath. He takes a picture and the photograph is published in his newspaper. Was her right of privacy violated? In this case, it would not seem that her right of privacy was violated, so far as the actual taking of the photograph is concerned. One has a right to take a picture of anything that he can see, provided no other rights are violated. The star went on the private sun deck of her apartment willingly and might well have known that an observer in an airplane or a nearby skyscraper might see her. Legally, she voluntarily exposed herself to those who might see, although she might have believed that no one would see her.

However, if the photographer released the picture to his newspaper, as he did in this hypothetical case, there would seem to be a violation of her privacy. By taking the sun bath in what she considered private quarters, she did not consent to having her photograph spread over the nation. Of course, it is assumed that this right is recognized in that particular jurisdiction.

Wire tapping may be regarded as an invasion of privacy, particularly the privacy of the home; in fact, several states have passed statutes making wire tapping a criminal offense. In Rhodes v. Graham [14] the court stated:

[14] 238 Ky. 225, 228, 229, 37 S.W.2d 46, 47 (1931).

> A person is entitled to the privacy of his home as against the unwarranted invasion of others, and a violation thereof will give rise to an action. It is the legal right of every man to enjoy social and business relations with his friends, neighbors, and acquaintances, and he is entitled to converse with them without molestation of intruders. * * *
>
> Wire tapping is akin to eavesdropping, which was an indictable offense at common law, and while it has not been made a punishable offense by statute in this state, we conclude that the facts alleged in the petition in the case constitute a wrong done to appellant for which the law affords a remedy by an action for damages.

Since the passage of the Federal Communications Act of 1934, 47 U.S.C.A. § 151 et seq., wire tapping is illegal so far as interstate and foreign communications are concerned.[15] It has been held further that Federal agents cannot give evidence obtained by wire tapping through intrastate or interstate calls.[16] Violation of the provisions against wire tapping is a criminal offense. Sections 605 and 501 of the Federal Communications Act of 1934 respectively prohibit wire tapping and divulging of information so obtained, and make such acts criminal offenses.

It was held in U. S. v. Polakoff,[17] that within the contemplation of the wire tapping provision any message is intercepted when the listener does not consent despite the means of interception employed.

Prior to the passage of the Federal Communications Act, evidence obtained by means of wire tapping did not involve any constitutional guaranty against self-incrimination; this position was established in Olmstead v. U. S.[18] but is now made legally inacceptable because of this enactment by Congress in 1934.

The Federal Communications Act, however, does not affect the right of the several states to determine for themselves the admissibility of evidence procured by means of wire tapping.[19]

Several phases of criminal and constitutional law illustrate what might be based in part on conceptions of privacy. The Fourth

15 Valli v. U. S., 303 U.S. 632, 58 S. Ct. 760, 82 L.Ed. 1092 (1938).

16 Diamond v. U. S., 108 F.2d 859 (C.C.A.Ohio 1938).

17 112 F.2d 888, 134 A.L.R. 607 (C. C.A.N.Y.1940).

18 277 U.S. 438, 48 S.Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376 (1928).

19 Ibid.; also Rowan v. State, 175 Md. 547, 3 A.2d 753 (1939).

Amendment of the United States Constitution establishes the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. A private home may not be searched without a search warrant unless such search is incidental to a lawful arrest.[20] Search of a private residence must be made on the basis of a warrant orderly issued under statutory requirements and based on probable cause.[21] Injunctive relief may be given against unreasonable searches and seizures when they are made without probable cause, without previous knowledge of the circumstances, and without any commission of crime.[22]

The immunity against unlawful searches and seizures extends to one's office,[23] place of business,[24] or his premises,[25] but not on open premises or parts of the premises not within the common curtilage.[26] In Dulek v. U. S.[27] it was held that such immunity would not extend to a still located in a swamp several hundred feet from the accused's dwelling.

The Fifth Amendment declares that no person "shall be compelled in any criminal case to be a witness against himself." The taking of fingerprints, it was held in People v. Sallow,[28] does not violate this constitutional guaranty, for the physical facts are said to speak for themselves. A private person not convicted of crime may not without his consent have his fingerprints taken and filed in permanent criminal files.[29] It is generally established however that any person charged with crime may be lawfully fingerprinted and photographed by the police.[30] If the fingerprints of one charged with vagrancy are tak-

[20] U. S. v. Lee, 83 F.2d 195 (C.C.A. N.Y.1936); U. S. v. Kaplan, 17 F. Supp. 920 (D.C.N.Y.1937); State v. Brockman, 231 Wis. 634, 283 N.W. 338 (1939).

[21] U. S. v. Zager, 14 F.Supp. 23 (D. C.Md.1936).

[22] Hague v. Committee for Industrial Organization, 101 F.2d 774 (C. C.A.N.J.1939); certiorari granted 306 U.S. 624, 59 S.Ct. 486, 83 L.Ed. 1028 (1939); modified, 307 U.S. 496, 59 S. Ct. 954, 83 L.Ed. 1423 (1939).

[23] State v. Bates, 187 Miss. 172, 192 So. 832 (1940).

[24] Wallace v. Ford, 21 F.Supp. 624 (D.C.Tex.1937).

[25] Miller v. State, 174 Md. 362, 198 A. 710 (1938).

[26] Koth v. U. S., 16 F.2d 59 (C.C.A. Idaho 1927); U. S. v. Feldman, C.C. A.Pa., 104 F.2d 255 (1939); certiorari denied, 308 U.S. 579, 60 S.Ct. 97, 84 L.Ed. 485 (1939).

[27] 16 F.2d 275 (C.C.A.Mich.1927).

[28] 100 Misc. 447, 165 N.Y.S. 915 (1917).

[29] Schulman v. Whitaker, 117 La. 704, 42 So. 227, 7 L.R.A.,N.S., 274, 8 Ann.Cas. 1174 (1905).

[30] Bartletta v. McFeeley, 107 N.J. Eq. 141, 152 A. 17 (1930), aff., Err. &

en and it is found that he does not have a criminal record and that he is not guilty of vagrancy, he can request that his fingerprints be withdrawn and destroyed. It is common practice in such cases, to grant such a person's request.

The study of a line of significant cases indicates that courts are reluctant to recognize the right of privacy as such but that often relief is granted on other grounds. Many cases of libel may so be conceived that they could be regarded as invasions of the right of privacy. In Morrison v. Smith,[31] the defendant published the following advertisement:

> Illustrated new book. Up-to-date. The experience of a giddy typewriter girl in New York. Typewritten. Good is no name for it. Sent in plain wrappers, postpaid on receipt of 25 cents in silver or stamps.

Accompanying the advertisement was a picture of a young woman, who, it was later revealed, was not a typist or stenographer, but an actress and a married woman of good reputation. It was held that the advertisement was a libel *per se*. Clearly this was a case of libel but in fact such a libel as invaded the privacy of a married woman with the salacious inferences of the copy.

Libel may be directly or indirectly a violation of the right of privacy. A defamatory statement which brings a private person into contempt or ridicule interferes with his personal right of choosing within certain limits the kind of an existence he wishes to lead. The means of obtaining information, which may be distorted into a libelous statement, may be clearly a wanton violation of one's right of seclusion.

In Thorley v. Lord Kerry,[32] early authority on the distinction between oral and written defamation, the action was for libel. Thorley wrote a letter to Lord Kerry, the plaintiff below, calling him a hypocrite who used the cloak of religion for unworthy purposes. A servant opened the unsealed letter and read its contents, thus constituting publication. Lord Kerry recovered damages. Here was clearly a libel on the reputation of a citizen but also an invasion of his right of privacy, first by the servant who opened the letter, and second by the writer of the letter whose act in giving such a personal letter to a servant unsealed made possible the publication of the libelous statement.

App., 109 N.J.Eq. 241, 156 A. 658 (1931).

[31] 177 N.Y. 366, 69 N.E. 725 (1904).

[32] (1812) 4 Taunt. 354.

The threatened publication of private information, which in effect may be both defamation and a violation of the right of privacy, has not generally been remedied through injunctive relief. Courts are reluctant to grant injunctions to prevent publication of libelous statements. Early recognized authority for such relief however is Gee v. Pritchard,[33] in which a bill charged Pritchard with proceeding to publish letters of the plaintiff, without the latter's consent. The injunction was granted on the ground that the plaintiff had a property right in the letters. Actually what Lord Eldon did was to restrain publication of the plaintiff's private letters by her deceased husband's adopted son; the technical right of property in the letters themselves was utilized to prevent injury to the plaintiff's feelings and possible damage to her reputation.

Equitable relief was granted in Dixon v. Holden,[34] enjoining the publication of an advertisement concerning a meeting of creditors on the ground of a property right. Sir R. Malins granted a perpetual injunction on the theory that a property right had been violated, summarizing the case and his reasons as follows:

> The defendants have no right to suggest, as they do by the notice they threaten to publish, that the plaintiff was a partner in a bankrupt firm. It is sworn, and I am satisfied it is correctly sworn, that the present firm of W. Dixon & Co. has nothing to do with the firm of Dixon Brothers, which was bankrupt; yet the publication intended to be circulated by the defendants states, not only that he was a member of that firm, but that he has concealed the fact from the creditors, and has thereby defrauded them of the contributions which, as partner of that firm, he would be bound to make, and which contributions, if made, would have resulted in payment of the creditors in full. When remonstrated with in a very proper letter written by the solicitor, the defendants, instead of apologizing to Mr. Dixon for the grievous offence they had been guilty of, actually repeat the offence in a more aggravated form, saying that they will bring this gentleman to the bar of justice, and will prove that he was a member of the bankrupt firm. * * *
>
> Now the business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and therefore to be injured in his business is to be injured in his property. But I go further, and say if it had only injured his reputation, it is within the jurisdiction of this Court to stop the publication of a libel of this descrip-

[33] Court of Chancery (1818) 2 Swans. 403.

[34] Court of Chancery (1869) 7 Eq. Cases 488.

> tion which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property.[35]

The close relationship between libel and privacy in a particular instance is illustrated in Merle v. Sociological Research Film Corporation.[36] The plaintiff attempted to show two causes of action, both based upon a motion picture film, "The Inside of the White Slave Traffic," in which the producer of the film depicted the plaintiff's factory building bearing the name of August G. Merle & Co. The film gave an exposé of white slave traffickers and panderers at work, showing the inside of a factory. The defendant demurred to both complaints, but the court overruled the demurrer on the libel action, although the demurrer on the privacy action was sustained.

It was held that a factory owner controlled his factory as to persons admitted, and that inasmuch as it was inferred that his factory harbored such panderers, his good name might be libeled. It was pointed out, however, that a restaurant or a saloon keeper on the contrary could not so control such establishments which invited the public to enter.

Inasmuch as the name of the plaintiff's factory was photographed incidentally, the court held that the lower court properly sustained the demurrer to the privacy action. The court stated:

> To constitute a violation of the Civil Rights Law I think it must appear that the use of the plaintiff's picture or name is itself for the purposes of trade and not merely an incidental part of a photograph of an actual building, which cannot be presumed to add to the value of the photograph for trade or advertising, and even a use that may in a particular instance cause acute annoyance, cannot give rise to an action under the statute unless it fairly falls within the terms of the statute.[37]

Opposite results are shown in McNulty v. Press Pub. Co.,[38] in which the plaintiff brought actions for libel and violation of privacy on the ground that the Press Pub. Co. and its agent cartoonist, H. T. Webster, published a cartoon entitled, "The Boy Who Made Good," containing a photographic reproduction of the plaintiff. The libel action was dismissed, but the motion to dis-

35 Ibid., 491, 492.

36 166 App.Div. 376, 380, 381, 152 N.Y.S. 829 (1915).

37 Ibid., 166 App.Div. 380, 152 N.Y.S. 832.

38 136 Misc. 833, 241 N.Y.S. 29 (1930).

miss the privacy action was denied. The court held that there was nothing in the reproduction of the picture that injured the reputation of the plaintiff; however, inasmuch as the *New York World,* published by the Press Pub. Co., syndicated the cartoon to other papers, there was a use of the picture for purposes of trade, according to the court, which stated:

> While the statute does not prohibit a newspaper from using or publishing in a single issue the name and picture of a person without his consent having first been obtained, the charge is not confined to such use, but includes also the sale by the defendants to others, for profit, of cartoons containing plaintiff's picture. This is a use "for purposes of trade" and prohibited by statute.[39]

The *New York Evening Journal* was sued for libel on the basis of the following story:

> **Weds Sister-in-Law**
>
> She accepted him and on January 16, 1905, they were married. Five days later Hoch was courting Mrs. Catherine Kimmerle in New York, in a rooming house she conducted, on 47th St. at Tenth Avenue.
>
> Mrs. Fisher complained to Chicago police about the disappearance of her husband. This report called attention to his previous marriage and his wife's death. Police exhumed the body. Poison was found. The dirty blood-smeared record he'd left behind came quickly to light.
>
> The alarm went for Hoch as a murderer.
>
> Detective James J. O'Neill, a rookie of the W. 47th St. police station, turned Hoch in. It was chance that led him to the rooming house. He noticed two new trunks being taken in. He inquired about their ownership. He learned they belonged to man after the description of Hoch. He won Mrs. Kimmerle's confidence. He went to the house one night when Hoch was downstairs. He stumbled, purposely, entering the parlor. He fell against the wily German, stripped him of the pistol he had in a dressing gown pocket.
>
> The arch fiend was trapped.
>
> Hoch was strung from the gallows in Chicago February 23, 1906.

"Written words, the effect of which is to invade privacy and to bring undesired notoriety, are without remedy, unless they also appreciably affect reputation," it was held in Kimmerle v. New York Evening Journal.[40] This suit on the basis of libel was held

[39] Ibid., 136 Misc. 833, 241 N.Y.S. 32.

[40] 262 N.Y. 99, 102, 186 N.E. 217 (1933).

not defamatory. It was stated that "courting" is a vague term and does not imply immoral conduct, as was alleged in the original complaint.

The courts in certain jurisdictions have resorted to privacy or what might be termed a privacy situation in order to give relief in certain types of cases. In Brents v. Morgan,[41] for example, a defense of truth might have prevented recovery, but the court held that relief could be granted on the grounds of privacy. The defendant in this case used a sign, five by eight feet, in a display window as follows:

Notice

> Dr. W. R. Morgan owes an account here of $49.67. And if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid.

In the trial court the plaintiff won, but upon appeal the judgment was reversed and remanded for further proceedings. In its opinion the court stated:

> A new branch of the law has been developed in the last few years which has found place in the text-books and the opinions of courts which is denominated the right of privacy. It has not been concretely defined, and probably is not subject to a concrete definition, but it is generally recognized as the right to be let alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned.[42]

Interference with one's enjoyment of his personal freedom of locomotion has been held to constitute an actionable wrong. In Schultz v. Frankfort Marine, Accident, Plate Glass Insurance Co.,[43] the court held that the plaintiff's personal rights were violated when the defendants had used open or rough shadowing which tended to bring him into contempt or ridicule. The reasoning of the court was based upon the analogy that inasmuch as pictures or cartoons tending to disgrace a person or bring him into public disesteem would be libelous, the acts so pictured would likewise be defamatory.

This case was decided upon the theory of defamation rather than that of privacy; however, it may be observed that the libel

[41] 221 Ky. 765, 299 S.W. 967, 55 A. L.R. 964 (1927).

[42] 221 Ky. 765, 770, 299 S.W. 967, 969, 55 A.L.R. 964.

[43] 151 Wis. 537, 139 N.W. 386, 43 L.R.A.,N.S., 520 (1913).

is such as embraces privacy. It is submitted also that the facts of this case in reality constitute what has been termed libel by conduct.

Summarization of a few of the general principles of privacy as founded on reason or authority noted in most of the well considered cases is given in Melvin v. Reid [44] as follows:

1. The right of privacy was unknown to the ancient common law.
2. It is an incident of the person and not of property—a tort for which a right of recovery is given in some jurisdictions.
3. It is a purely personal action, and does not survive, but dies with the person.
4. It does not exist where the person has published the matter complained of, or consented thereto.
5. It does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public and thereby waived his right to privacy. There can be no privacy in that which is already public.
6. It does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit, as in the case of a candidate for public office.
7. The right of privacy can only be violated by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth.
8. The right of action accrues when the publication is made for gain or profit. (This, however, is questioned in some cases).

§ 70. JUDICIAL RECOGNITION OF PRIVACY

Development of concept of privacy shows dichotomic foundation in both theory and treatment of particular cases.

The fact that early common law does not mention the right of privacy does not preclude the recognition of this right in a complex, modern world, in which new conditions have developed, conditions more or less foreign to the civilization under which the tenets of the common law were formulated. Jurisdictions in which the right of privacy has been given some substantial and favorable recognition in reported cases include: California, District of Columbia, Georgia, Kansas, Kentucky, Louisiana, Mis-

[44] 112 Cal.App. 285, 290, 297 P. 91, 92 (1931).

souri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, and South Carolina.[45]

To this list there might be included Washington which although denying the right in Hillman v. Star Publishing Company,[46] gave relief on the unauthorized use of a name in State v. Hinkle.[47] In the unreported case of Blazek v. Rose,[48] the petitioner was given a temporary injunction by the Circuit Court of Cook County, Illinois, on the basis of unauthorized use of name and the direction of public attention to him for the purpose of profit. Young Blazek was the son of one of "Siamese" twin women, who had been employed by a show manager. The contract with the twins did not cover exhibition of the son. Clearly, his privacy was invaded, and it is submitted that the court was right in granting a temporary injunction. There are likely other lower court unreported cases of invasion of privacy, particularly when privacy is conceived in a large sense so that protection might be granted on the basis of violation of contract, common law copyright, disorderly conduct, or on the basis of breach of trust.

Some legal recognition of privacy has been made in lower Pennsylvania courts. Recovery for an alleged violation of this right was denied in Harlow v. Buno Co.,[49] though the court stated:

> It is evident, therefore, that the recognition of this right requires that liability for its invasion must be limited and cannot be extended without restriction. It is likewise apparent that the invasion of this right requires a direct trespass, the necessary element of which is intent.

In a later Pennsylvania case, involving the taking of a picture of a patient showing facial disfigurement resulting from illness, the court dismissed preliminary objections with leave for the de-

[45] Case and Comment, Vol. 48, #1, p. 39—"The doctrine of privacy has had a checkered career, approved in California, District of Columbia, Georgia, Kansas, Kentucky, Missouri, North Carolina, Ohio, Oregon and Pennsylvania, dodged in Arkansas, England, Massachusetts, Montana and Wisconsin, looked on skeptically by Michigan, smiled on in Louisiana, New Jersey and South Carolina, absolutely denied in Rhode Island, and definitely established by statute in New York." See, also, 138 A.L.R. 22.

[46] 64 Wash. 691, 117 P. 594, 35 L. R.A.,N.S., 595 (1911).

[47] 131 Wash. 86, 229 P. 317 (1924).

[48] See Chafee, Z., Jr., and Pound, Roscoe, Cases on Equitable Relief Against Torts, including Defamation and Injuries to Personality, pp. 138, 139.

[49] 36 Pa.D. & C. 101, 105 (1939).

fendant to file an amended answer under penalty of having a decree taken *pro confesso*; in its opinion this court stated:

> The powers of equity are not so impotent that such a situation will be tolerated. The remedy afforded must be such as to destroy the roots of the evil and this can only be done by mandatory injunction.[50]

Privacy in the larger concept was held violated in Waring v. WDAS.[51] Although the ground of the majority opinion was based upon common law copyright and unfair competition in the personal interpretation of musical renditions, the concurring opinion of Justice Maxey was based on privacy. The facts were that the radio station played records of Waring's music from recordings made under contract with the Victor Talking Machine Company; by the contract however the radio rights were reserved. Under the Federal Copyright Act there is no provision for the copyrighting of a rendition of a musical score or the manner of performance of a dramatic act. But inasmuch as a performance of a play or the playing of a musical score does not under the law necessarily constitute publication to the public so as to destroy common law copyright, Waring had that right. The opinion of Justice Maxey stated in part as follows:

> A man may object to *any* invasion of his right to privacy or to its *unlimited* invasion. He may choose to render interpretations to an audience of one person in a private home or to an audience in a great amphitheatre. When a writer of a letter objects, as he may with legal effectiveness, to any publication of that letter by its recipient, or to its publications *more widely than he authorized,* his purpose is not to protect his property, but his privacy. The publication of his letter might not and probably would not cause him one cent's worth of damages, but it might upset his peace of mind and disturb his social relations exactly as would the tapping of his telephone wire or the rifling of his diary or correspondence. A person who insists that his telephone wire be not tapped is not solicitous about his property rights any more than is a person who asks police authorities to furnish him a bodyguard to protect him against intrusions. A person who asks a court of equity to prevent his photographs or his artistic renditions from being indiscriminately disturbed is likewise seeking the repulsion of intrusions. * * *
>
> It requires but little argument to show that since a man has a right to withhold from *all dissemination,* his thoughts, sentiments and emotions no matter what their media of expression, he has a right to restrict or limit this dissemination. It

[50] Clayman v. Bernstein, 38 Pa.D. & C. 543, 550 (1940).

[51] 327 Pa. 433, 194 A. 631 (1937).

> is settled that a man may write letters to one person or to a hundred or more persons and yet possess the right to prevent the publication of those letters to the public in general; and that he may consent to having his picture taken and distributed among his friends and still prevent the unauthorized publication of those pictures. If a photographer is employed by a patron to take the latter's portrait, the photographer is not justified in making additional copies of such photograph for himself or in distributing them or publicly exhibiting them by way of advertising or otherwise, without the authority of the customer, either expressed or implied.[52]

As there is no general common law for the Federal government, it follows that there is no common law of privacy as interpreted by the Federal courts. Except for the United States Constitution and Federal statutes, the law to be applied by the Federal courts must be the law of the individual state determined to have particular jurisdiction.[53]

Prince Albert v. Strange [54] has been cited as the earliest straightforward declaration of the existence of the right of privacy which will be protected by injunction and which does not depend upon recognition of such a right at common law. In this case an injunction was sought to restrain the exhibition of certain etchings. The court granted the injunction on the ground of a property right in the etchings and a breach of trust, pointing out that to postpone the relief sought would be equivalent to denying it altogether.

One of the earliest American cases based on the ground of privacy was the unreported case of Manola v. Stevens in which an application for an injunction to the Supreme Court of New York was filed on June 15, 1890.[55] In the complaint the petitioner alleged that she was an actress on Broadway and that during one performance she was photographed surreptitiously and without her consent, from one of the boxes of the theater. An interlocutory injunction was issued and at the time of the hearing the defendant did not appear; the injunction was made permanent.

In Roberson v. Rochester Folding Box Co.,[56] suit was based on the unauthorized appearance of a lithographic likeness of a young

[52] 327 Pa. 433, 458, 459, 194 A. 631, 642, 643.

[53] Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938).

[54] (1849) 18 L.J.Ch. 120, 1 Mac. and G. 25.

[55] See Pavesich v. New England Life Insurance Co., 122 Ga. 190, 205, 50 S.E. 68, 69 L.R.A. 101, 106 Am.St. Rep. 104 (1905).

[56] 171 N.Y. 538, 64 N.E. 442, 59 L. R.A. 478, 89 Am.St.Rep. 828 (1902).

girl, an infant, with the words, "Flour of the Family" to advertise the product of a flour milling company. The plaintiff's declaration alleged that her good name had been attacked and that she had suffered humiliation and so sought an injunction against further use of the lithographs. The trial court held that the declaration was not demurrable and that if a right of property was required to entitle relief, the case must stand upon the property right which one has in his own body. When the case came before the New York Court of Appeals, the decision was reversed by a divided court.

Chief Judge Parker who was supported by three associate judges held that no cause of action was set forth. The court endeavored to define its conception of privacy as follows:

> The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has a right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise.[57]

In a strong dissenting opinion Associate Judge Gray stated:

> The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regards his person and property as inviolate, and he has the absolute right to be let alone. The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his.[58]

Following the decision in Roberson v. Rochester Folding Box Co., New York enacted a statute establishing a right of privacy for the unauthorized use of a person's name, portrait, or picture

[57] 171 N.Y. 538, 544, 64 N.E. 442, 443, 59 L.R.A. 478, 89 Am.St.Rep. 828.

[58] Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 561, 64 N.E. 442, 449, 59 L.R.A. 478, 89 Am.St.Rep. 828.

in that state for purposes of advertising or trade without written consent of that person.[59]

In the United States, Pavesich v. New England Life Insurance Co.[60] openly and without the use of subterfuge recognized privacy as a natural right. In this case the insurance company used pictures of two individuals, one who was said to have purchased life insurance and the other who did not so purchase. Under the plaintiff's picture was the following paragraph: "In my healthy and productive period of life I bought insurance in the New England Life Insurance Company, of Boston, Mass., and today my family is protected and I am drawing an annual dividend on my paid-up policies." It happened that the plaintiff had no insurance in that company and had not given consent for the use of his picture. The plaintiff began an action of trespass upon his right of privacy. The court in reversing the judgment of the trial court which sustained a demurrer to the complaint stated:

> When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While of course the most flagrant violation of this right would be deprivation of life, yet life itself may be spared and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor or violate public law or policy. The right of personal security is not fully accorded by allowing an individual to go through life in possession of all of his members and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail or free from other physical restraints. The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint.[61]

In Rhodes v. Sperry and Hutchinson Co.,[62] the constitutionality of the privacy provision of the Civil Rights Law was upheld after being challenged upon the following grounds: (1) that it deprived persons of their liberty without due process of law; (2) that it deprived persons of their property without due process of law; and (3) that it violated the Federal Constitution because it impaired the obligations of contracts. The court in affirming the

[59] Art. V, Sections 50, 51, Civil Rights, N.Y.Law 1909, Consol.Laws, c. 6.

[60] 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am.St.Rep. 104 (1905).

[61] 122 Ga. 190, 195, 50 S.E. 68, 70, 69 L.R.A. 101, 106 Am.St.Rep. 104.

[62] 193 N.Y. 223, 85 N.E. 1097, 34 L.R.A.,N.S., 1143, 127 Am.St.Rep. 945 (1908).

judgment for the plaintiff and upholding the constitutionality of the statute pointed out that a person under the provision is free to use his name or portrait as he pleases so that his freedom in such use is not restricted and that so long as the statute was prospective in nature, applying only to future uses of name and portrait without consent of the owner thereof, there would be no impairment of the obligation of contracts. The court stated:

> The power of the legislature in the absence of any constitutional restriction to declare that a particular act shall constitute a crime or be actionable as a tort cannot be questioned, where the right established or recognized and sought to be protected is based upon an ethical sanction. Such is the character of the right of privacy preserved by legislation protecting persons against the unauthorized use of their names or portraits in the form of advertisements or trade notices. It is a recognition by the law-making power of the very general sentiment which prevailed throughout the community against permitting advertisers to promote the sale of their wares by this method, regardless of the wishes of the persons thereby affected. There was a natural and widespread feeling that such use of their names and portraits in the absence of consent was indefensible in morals and ought to be prevented. * * * It is not a valid objection to the act of 1903 that it creates a right of action and imposes a liability unknown to the common law.[63]

Statutory enactment established grounds for the right of privacy decision in Melvin v. Reid.[64] In this case a motion picture film, entitled, "The Red Kimono", portrayed the life of a former prostitute who had rehabilitated herself and had married, thereafter living a normal, moral life. In the picture the real name of the woman was used. The court held that upon the basis of a California statute [65] guaranteeing the right to pursue and obtain happiness, her right of privacy was invaded. In her complaint the plaintiff stated four causes of action, one being based on the violation of the right of privacy, and the second, third, and fourth being based on a supposed property right in the incidents of her life and her maiden name. Demurrers on all counts were sustained in the trial court, but upon appeal the judgment as to the

[63] Ibid., 193 N.Y. 228, 85 N.E. 1099, 34 L.R.A.,N.S., 1143, 127 Am.St.Rep. 945.

[64] 112 Cal.App. 285, 297 P. 91 (1931).

[65] Section 1, Art. 1, Constitution of California: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

first count was reversed. In reviewing the development of the so-called right of privacy, the court stated the following:

> A reading of most of the decisions in jurisdictions recognizing this right leaves the mind impressed with the lack of uniformity in the reasoning employed by the various jurists supporting it. Most of the cases turn upon questions of breaches of contracts, either express or implied, such as the breach of an implied contract on the part of a photographer to print only such pictures as may be ordered by his subject, and not to print others and use them for purposes of advertising. Others are based upon the breach of a trust or confidence which one placed in or gave to another. Others recognize a property right in private letters and private writings which will not permit their publication without consent. In others the publication is so nearly akin to a libel that the final conclusions could be supported under the law of libel without invoking the doctrine of the right of privacy.[66]

Douglas v. Stokes [67] is a comparatively early American authority for the existence of the right of privacy. To the plaintiff and his wife were born "Siamese" twins, or children joined together from the shoulders to the end of their bodies. After the death of these children the father employed a photographer to take a negative of the twins in the nude and to furnish him with twelve prints. Contrary to the agreement with the father, the photographer made extra prints which he copyrighted. The father sued the photographer for damages and obtained an award of $2,500 in the lower court, a judgment which was affirmed in the state supreme court.

Analysis of the decision shows that the violation causing the injury in question was based upon breaking of the contract with the father and upon a property right in the dead body of his children. It is inferred by the court that the negative was obtained through a confidential relationship of employment and that the photographer's act in copyrighting the print without permission of the father constituted a breach of trust.

Protection for Names

The classic authority for injunctive relief against the unauthorized use of a person's name is Routh v. Webster.[68] In this

[66] 112 Cal.App. 285, 287, 297 P. 91.

[67] 149 Ky. 506, 149 S.W. 849, 42 L. R.A.,N.S., 386, Ann.Cas.1914B, 374 (1912).

[68] Routh v. Webster (1847) 10 Beav. 561.

case the provisional directors of Economic Conveyance Company, a joint stock company, used the name of the plaintiff, Routh, in a prospectus, giving him as a trustee of the company, and also paid monies to the bankers of the company to the plaintiff's account. The plaintiff, foreseeing that he might be subjected to responsibility by the unauthorized use of his name, sought to enjoin such use. The court granted the injunction to restrain the defendants from printing, publishing, or circulating any prospectus or other document of the company with the plaintiff's name therein. The Master of the Rolls, Lord Langdale, in his opinion stated:

> The name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee: his name was also used at the bankers; and though he may not be subjected to the duties of trustee, yet it is plain that he is exposed to some risk by the unauthorized act of the defendants in using his name. Money was placed in his name at the bankers, and he is left to get rid of his responsibility as he can. * * *
>
> I am of opinion that the plaintiff is entitled to the injunction; and, if it subjects the defendants to expense, let it be a warning to them as well as to others not to use the names of other persons without their authority. What! Are they to be allowed to use the name of any person they please, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and are they then to be allowed to escape the consequences by saying they have done it by inadvertence? Certainly not.[69]

In Binns v. Vitagraph Co.,[70] it was held that the New York statute on privacy would apply to the unauthorized use of a private name in connection with a feature motion picture, although an actual event took place concerning the person whose name is used. The event so taken and fictionalized was the collision of the steamships Republic and Florida. Jack Binns was the wireless operator on the Republic and for the first time in such an accident used the wireless to summon aid. It was an historic event and Binns received wide publicity in the press. There was no objection to his name being used currently in a news event, but sometime after the defendants prepared a motion picture in which an actor impersonated Binns. The court held that such use of his name was a matter of business and profit and so contrary to the statute.

[69] Ibid., 562.

[70] 210 N.Y. 51, 103 N.E. 1108, L.R.A. 1915C, 839, Ann.Cas.1915B, 1024 (1913).

Humiston v. Universal Film Mfg. Co.[71] held that the publication of a private name in a news reel would not constitute a violation of privacy. The news motion picture showed the plaintiff engaged in legal work concerned with the solution of a murder mystery. It was held also that an advertisement of the film outside the motion picture theater was not such a violation of privacy as would come within the statute, but rather was an incidental use of the name in connection with a news event shown in the film being displayed. It is submitted that the decision is logical and sound from a practical viewpoint but that so far as the strict interpretation of the statute is concerned it would seem that the advertisement of a name and an event in connection therewith might be regarded to some degree as a use for purposes of trade and profit. The distinction between the two cases, Binns v. Vitagraph Co. and Humiston v. Universal Film Mfg. Co., is both clear and sensible. It can be observed however how difficult interpretations of the New York statute on privacy may be.

The protection of the name of a public character was exemplified in State v. Hinkle [72] when the Supreme Court of Washington ordered the name of the late Senator Robert M. LaFollette stricken from an unauthorized use on an election ballot. Said the court:

> Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built up are inseparably connected with it. Others can have no right to use it without his express consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it. Nor is it necessary that it be alleged or proved that such unauthorized use will damage him. This the law will presume. But it was said in the argument that consent to the use of his name in connection with the State Party had been obtained before that party held its convention. If at one time Mr. LaFollette gave consent to the use of his name in this connection, it was nothing more than a bare license or permission which may be revoked by him at any time; and in this case, if the permission were given, he has chosen to exercise his lawful right to revoke it. No authorities are cited by either of the parties concerning the unauthorized use of a man's name, and within the short time at our disposal our briefing has failed to disclose any such case. But we have no hesitancy, even without the backing of authority, in holding that those organizing and creating the LaFollette State Party had no right to use Mr. LaFollette's name in that connection against his wishes.[73]

[71] 189 App.Div. 467, 178 N.Y.S. 752 (1919).

[72] 131 Wash. 86, 229 P. 317 (1924).

[73] 131 Wash. 86, 93, 229 P. 317, 319.

In Nebb et ux. v. Bell Syndicate, Inc.,[74] Rudy and Ethel Shuman Nebb living in a Southern town sued on the ground of violation of privacy based on the use of Rudy Nebb's name in a cartoon comic strip. It was charged that the cartoonist, a resident of Chicago, and a newspaper and a feature syndicate, both of New York, had used this real person's name for purposes of trade, thus violating the New York privacy act. The court dismissed the complaint because the complaint was held insufficient to set forth a cause of action; it was pointed out that the use of the name Nebb in the cartoon, "The Nebbs" was not intentional, and in no way referred to the plaintiff.

In South Carolina it was held that the use of a woman's name in obtaining an insurance policy on her life without her consent was not such a violation of privacy as to entitle her to damages.[75] The court however recognized that under circumstances a right of privacy exists.

The use of a private name in a national magazine, if the name possesses current news interest, would not be a violation of privacy. The *New Yorker* published an article on William James Sidis, the son of a former Harvard University Professor. Many years prior to such publication young Sidis had been regarded as a child prodigy at Harvard, capable of handling the most difficult problems in mathematics. Following his graduation from Harvard at the age of sixteen, young Sidis lived an apparently normal life but eventually settled down to activity far below the expectancy at the time of the brilliant career of his university days. The article, giving his name and cartoon, depicted the life and interests of this one time prodigy. Young Sidis sued the publishing company for violation of privacy under the New York Civil Rights Law, but the court held that the New York statute did not have in contemplation the publication of articles giving truthful news and other information about an unusual personality. The United States Circuit Court of Appeals affirmed the decision of the trial court in dismissing the complaint.[76] Use of advertisements in newspapers announcing the contents of the magazine but not mentioning Sidis by name, was held mere incidental use and did not cause a violation of the privacy statute.

[74] 41 F.Supp. 929 (D.C.N.Y.1941).

[75] Holloman v. Life Insurance Co. of Virginia, 192 S.C. 454, 7 S.E.2d 169, 127 A.L.R. 110 (1940).

[76] Sidis v. F-R Publishing Corp., 113 F.2d 806, 138 A.L.R. 15 (C.C.A.N.Y.1940), aff. 34 F.Supp. 19 (D.C.N.Y. 1938).

The incidental use of a person's name in a book or in an article does not violate the New York law of privacy.[77] When the name of a real person is used in fiction many times, the evident intent is to capitalize on that person's name; in such a case, a motion to dismiss the action was denied by a New York court.[78]

In Damron v. Doubleday, Doran & Co.,[79] the plaintiff brought actions against the author of the novel, "Show Boat," against the publishers of the novel, and against a bookseller. In the 398 page book, the plaintiff's name was mentioned once, in a scene laid in Catlettsburg, Kentucky. The several actions were dismissed. It is submitted that so far as the law affecting publications of facts, a contrary decision would be dangerous. Such mention of a private name in a biography, a history, or a news story if regarded as a violation of the New York privacy statute would be a distinctly adverse limitation to the reporting of facts. It would seem that on the basis of this case, such use of a name would not be such a use of such name as was contemplated by the legislature. The court stated:

> The Legislature, but not the courts, may widen the scope of the statute. We have only to consider whether in its present form it applies here. The decisions of our courts show that every unauthorized use of a name or picture in connection with trade or advertising does not imply a violation of the statute. Were it otherwise, many lines of business would have to be abandoned. The Legislature did not, for example, intend to stop the dissemination of "news" as a business in itself or as adjunct to the sale of advertising. The courts in this instance, as in all others, must seek the true intent of the Legislature. * * * The law was not passed with the idea of interfering with the circulation of newspapers or the publication of books within proper limits, and the use of "local color" was not outlawed. It goes without saying that literary expediency may not be advanced as an excuse for violating the statute.
>
> In determining whether a name or likeness used primarily for advertising or trade, we may have to weigh the circumstances, the extent, degree, or character of the use. It is well established that every incidental mention of some person's name in connection with advertising or trade does not constitute a violation of the provisions under consideration. The single appearance of plaintiff's name in this book is clearly not a use prohibited by the statute. Were we to take any oth-

[77] People, on complaint of Stern v. Robert R. McBride & Co., 159 Misc. 5, 288 N.Y.S. 501 (1936); Kline v. Robert M. McBride & Co., 170 Misc. 974, 11 N.Y.S.2d 674 (1939).

[78] Krieger v. Popular Publications, 167 Misc. 5, 3 N.Y.S.2d 480 (1938).

[79] 133 Misc. 302, 231 N.Y.S. 444 (1928).

> er view, it is apparent that consequences never contemplated would follow from its enactment. It would indeed impose uncalled-for burden and hazard, were we to hold that publishers and book sellers could not lawfully publish or deal in books without the production of genuine, written consents from everyone mentioned even once, or that an author could not lawfully mention anyone without like consent.[80]

In d'Altomonte v. New York Herald Co.,[81] a sensational story was the basis of actions for libel and violation of privacy. The appellate division affirmed the overruling of the demurrer to the complaint; this decision was modified by the New York Court of Appeals, which sustained the defendant's demurrer on the privacy count and affirmed the overruling of the demurrer on the libel count. It is submitted that this decision would seem in line with other New York cases. The use of the name of the plaintiff as author of a highly sensational story naturally would bring him into contempt and ridicule. There was no use of the name for purposes of trade or advertising, although it is realized that the use of a famous name as the author of a story would enhance the value of the manuscript and the possible number of readers of the story, as was noted in a dissenting opinion in the appellate division.

Violation of the right of privacy in the use of a name is clearly indicated in Kerby v. Hal Roach Studios.[82] For the promotion of a motion picture in Los Angeles, 1,000 copies of the following letter were written in delicate handwriting on pink stationery and mailed to men in that territory:

> Dearest:
>
> Don't breathe it to a soul, but I'm back in Los Angeles and more curious than ever to see you. Remember how I cut up a year ago? Well, I'm raring to go again, and believe me I'm in a mood for fun.
>
> Let's renew our acquaintanceship and I promise you an evening you won't forget. Meet me in front of Warners Downtown Theatre at 7th and Hill on Thursday. Just look for a girl with a gleam in her eye, a smile on her lips and mischief on her mind.
>
> Fondly,
> Your ectoplasmic playmate,
> Marion Kerby

[80] Ibid., 133 Misc. 302, 231 N.Y.S. 445.

[81] 208 N.Y. 596, 102 N.E. 1101 (1913), modifying 154 App.Div. 453, 139 N.Y.S. 200 (1913).

[82] 53 Cal.App.2d 207, 127 P.2d 577 (1942).

It developed that there was a woman by that name in Los Angeles though the studios had not intentionally used her name.

The nonsuit given by the trial court was reversed by the California Supreme Court, which stated:

> To suggest that a woman has written such a letter under such circumstances is to impute to her a laxness of character, a coarseness of moral fibre and a willingness to scrape acquaintanceship for no good purpose; and to spread such imputations abroad, as defendants have done, is as much an invasion of the right of privacy as was the publication of true but derogatory statements in Melvin v. Reid, 112 Cal.App. 285, 297 P. 91 (1931). * * *
>
> The case bears considerable analogy, both as to the right invaded and the nature of the injury inflicted, to one of libel. It is well established that inadvertence or mistake affords no defense to a charge of libel, when the defamatory publication does, in fact, refer to the plaintiff.[83]

Oregon recognized a violation of the right of privacy in the unauthorized use of a name in its supreme court decision in Hinish v. Meier and Frank Co., Inc.[84] The facts were that a bill was before the legislature which if passed would have prevented the defendants from fitting and selling glasses. Kenneth C. Braymen, the manager of the defendant's optical department, sent the following telegram to the governor of the state:

> Governor Charles A. Sprague 1939 Feb. 28, PM, 9:36
> There is no demand for Optical Bill Seventy except by those who are financially interested in its passing. It is not a bill set out by the people I urge you to veto it
> George Hinish, 2810 NE 49 Ave

The use of the plaintiff's name was without his consent, and appropriated his name, personality, and influence. The trial court's judgment for the defendant was reversed by the Oregon Supreme Court, and the cause remanded.

It was held in Mau v. Rio Grande Oil, Inc.,[85] that the unauthorized use of one's name in a radio dramatization of a holdup in which that person was the victim was a violation of his right or privacy.

Injunctive relief will be granted to restrain the unauthorized use of another's name as part of a corporate title or as part of advertising in connection with such business; this principle is

[83] Ibid., 53 Cal.App.2d 207, 127 P. 2d 581.

[84] Hinish v. Meier & Frank Co., Inc., 166 Or. 482, 113 P.2d 438, 138 A.L.R. 1 (1941).

[85] D.C.Cal., 28 F.Supp. 845 (1940).

well exemplified in the significant case involving the unauthorized use of the name of Thomas A. Edison.[86]

When Letters Are Protected

Special property rights in personal letters are closely interwoven with the question of privacy. Are the personal letters one writes and sends to another the property of the receiver? It is recognized in law that one's thoughts are his own, even though he transfers his thoughts to paper, that is, so long as he does not publish his manuscript of such thoughts; this problem is peculiarly one of intellectual property or copyright, one form of personal property. However, this form of property impinges upon the question of privacy; in effect, the common law copyright protects the private thoughts of the one who prepares them.

This protection of special property rights in personal and familiar letters has long been recognized by the law. In 1741 the case of Pope v. Curl[87] was decided in favor of the writer of personal letters. Pope sought to enjoin the unauthorized publication of letters in a work entitled, "Letters from Swift, Pope and Others." A temporary injunction was issued but Curl, a bookseller, tried to have the court dissolve the injunction. The higher court continued the injunction as to the letters written by Pope but not as to those written to him.

The questions considered included:

1. Did the Parliamentary Act of 8 Anne, c. 19 for the encouragement of learning apply to personal letters?
2. Did the fact that the book was printed in another country make the book a lawful prize to booksellers in England?

The Lord Chancellor in considering the first question stated:

> I am of opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer.[88]

In regard to the second question the Lord Chancellor said that it would be extremely mischievous to make a distinction between

[86] Edison v. Edison Polyform Mfg. Co., 73 N.J.Eq. 136, 67 A. 392 (1907); see also Brown Chemical Co. v. Meyer, 139 U.S. 540, 11 S.Ct. 625, 35 L.Ed. 247 (1891).

[87] (1741) 2 Atkyns 342.

[88] Ibid.

a book of letters and any other learned work. While the defendant objected to the injunction as to the letters on the ground that in this case the letters were personal missives rather than literary letters intended for publication, the Lord Chancellor observed:

> It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable; for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading.[89]

On the point that in this case the book of letters was published in Ireland, the Chancellor held that there would be pernicious consequences and an invasion of the Act of Parliament if copyright in the home country could be avoided through actual printing of the work in another country.

If one writes a letter to a friend, the sending of the letter and its receipt give no right of publication to the recipient; the common law right of copyright has not been sacrificed. To such an extent, this law of copyright coincides to some degree with the law of privacy; the contents of the letter are strictly private; the writing to a personal friend does not constitute publication.[90]

In an early Louisiana case,[91] the court relied largely upon privacy in granting a temporary injunction to prevent the publication of a letter. The principles involved in this question were well considered in Grigsby v. Breckinridge[92] the facts of which as stated in the opinion show that Virginia Hart, first married to Alfred Shelby and later to Robert J. Breckinridge, died on May 8th, 1859, while she was the wife of Breckinridge. Mrs. Breckinridge had preserved many friendly and confidential letters received during her girlhood, widowhood, and married life. On her death bed she gave and delivered these letters to Mrs. Grigsby, the only daughter of her first marriage. Breckinridge, duly appointed administrator, brought a suit in equity to enjoin the publication of the letters written by himself. The trial court gave the judgment to the plaintiff. On appeal the judgment

[89] Ibid.

[90] Baker v. Libbie, 210 Mass. 599, 97 N.E. 109, 37 L.R.A.,N.S., 944, Ann. Cas.1912D, 551 (1912).

[91] Denis v. Leclerc, 1 Mart.O.S., La., 297, 5 Am.Dec. 712 (1811).

[92] 65 Ky. 480, 2 Bush. 480, 92 Am. Dec. 509 (1867).

was reversed except so far as the injunction against the publication of the letters written by himself to his wife was concerned.

The reasoning of the court was based on the well recognized theory that while letters in actuality become the property of the receiver, the right of publication of the message in a letter remains the special property of the writer of the letter. This theory is sound and widely accepted. Involved in such a problem is the question of property. The opinion gives adequate basis for the protection of privacy in private, written communications.

Violation of Privacy in the Use of Pictures

Pollard v. Photographic Co.[93] firmly establishes the right of privacy in a personal photograph. In this case the plaintiff ordered several pictures from a commercial photographer, and paid for the order. Later the photographer used her picture on a Christmas card. The court in granting an injunction against such use present and future justified its action on the sound legal grounds of breach of contract and breach of confidence. The court outlined its position as follows:

> The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. * * *
>
> The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer: and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only.[94]

An arrangement to have one's picture taken by a commercial photographer, or any other pictures so taken, is a contract.

[93] (1888) 58 L.J.Ch. 251, 40 L.R.Ch. Div. 345.

[94] (1888) 40 L.R.Ch.Div. 345, 349, 350.

In White Studio, Inc. v. Dreyfoos,[95] the court in reversing the action of the lower court in granting an injunction *pendente lite* stated:

> It is settled law that the ordinary contract between a photographer and his customers is a contract of employment. The conception as well as the production of the photograph is work done for the customers and they, not their employee, are the exclusive owner of all proprietary rights.[96]

In this case, the plaintiff had been employed to take some pictures for a third party. The defendants with the consent of this third party began the reproduction of the pictures themselves. The rule was affirmed that the person who contracts with a photographer may make what arrangements he or she desires with another party to reproduce the pictures without incurring liability to the original photographer.

If the photographer reproduces pictures ordered by another without the consent of such contracting party, if the transaction took place in New York, there would be a violation of privacy as established under the Civil Rights Law of that state.[97]

The right of privacy was denied in Henry v. Cherry & Webb,[98] in which the facts show that the plaintiff's picture was used in an advertisement for wearing apparel. Conclusively, the court held that in Rhode Island there is no right of privacy for the invasion of which an action for damages would lie at common law. In Thayer v. Worcester Post Co.,[99] the plaintiff sued for both libel and violation of privacy. The defendant's demurrers to the libel counts were overruled and its demurrers to the privacy counts were sustained. It seems that the plaintiff's picture was used in connection with a divorce case. Originally, the plaintiff had posed voluntarily with four other persons, including her husband and his chauffeur at an air port. The contention was made that, although the plaintiff had no property in the photograph, she had an absolute right not to have it published in circumstances disclosed without her consent. The picture as published was so excerpted as to show the plaintiff with the chauffeur. The court stated:

[95] 156 App.Div. 762, 142 N.Y.S. 37 (1913).

[96] Ibid., 156 App.Div. 763, 142 N.Y.S. 38.

[97] Kunz v. Bosselman, 131 App.Div. 288, 115 N.Y.S. 650 (1909).

[98] 30 R.I. 13, 73 A. 97, 24 L.R.A.,N.S., 991, 136 Am.St.Rep. 928, 18 Ann. Cas. 1006 (1909).

[99] 284 Mass. 160, 187 N.E. 292 (1933).

> It does not relate to violations of privacy which would involve acts in the nature of nuisance, or which are appropriation of the photographic reproduction for purposes of advertisement. Questions of that nature may be dealt with when they arise.[100]

In Themo v. New England Newspaper Pub. Co.,[101] the right of privacy was denied in the use of the picture of the plaintiff talking with an officer.

The use of a pugilist's picture in connection with a so-called biography in a newspaper,[102] publication of a picture in connection with a newspaper article,[103] the use of a picture of a factory identified by name in connection with a motion picture on the white slave traffic,[104] printing of a picture of the plaintiff wearing goods sold by a store and so identified,[105] the publication of an actress's picture in one issue of a magazine, the use of a picture and name in connection with a current events news picture,[106] the incidental use of a picture of a daughter in a group picture of a family on the occasion of a story on a criminal charge against the father,[107] use of a picture in a newspaper feature story concerning the Hindu rope trick, showing the picture of a musician (sic),[108] and the erection of a statue of a deceased woman,[109] have been held not to be violations of privacy.

It should be noted that the contest in Jeffries v. New York Evening Journal Pub. Co.[110] was relative to the use of a picture in connection with a biography, and that the plaintiff objected to the use of the picture in light of the fact that he himself had prepared and copyrighted an autobiography. The court in denying the motion for a temporary injunction noted that it had no jurisdiction in a statutory copyright case.

[100] 284 Mass. 160, 164, 187 N.E. 292, 294.

[101] 306 Mass. 54, 27 N.E.2d 753 (1940).

[102] Jeffries v. New York Evening Journal Pub. Co., 67 Misc. 570, 124 N.Y.S. 780 (1910).

[103] Moser v. Press Pub. Co., 59 Misc. 78, 109 N.Y.S. 963 (1908).

[104] Merle v. Sociological Research Film Corporation, 166 App.Div. 376, 152 N.Y.S. 829 (1915).

[105] Henry v. Cherry, 30 R.I. 13, 73 A. 97, 24 L.R.A.,N.S., 991, 136 Am.St. Rep. 928, 18 Ann.Cas. 1006 (1909).

[106] Colyer v. Richard K. Fox Pub. Co., 162 App.Div. 297, 146 N.Y.S. 999 (1914).

[107] Hillman v. Star Pub. Co., 64 Wash. 691, 117 P. 594, 35 L.R.A.,N.S., 595 (1911).

[108] Sarat Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N.Y.S. 382 (1937).

[109] Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22, 31 L.R.A. 286, 49 Am.St. Rep. 671 (1895).

[110] 67 Misc. 570, 124 N.Y.S. 780 (1910).

The use of photographic plates in connection with biography,[111] publication of a picture without consent in connection with a testimonial of a proprietory medicine,[112] publication of pictures showing the correct way to board and alight from a street car,[113] exploitation of a person's photograph taken in defendant's store and exhibition of such picture without consent in a local motion picture theater,[114] the syndicating of a cartoon showing representation of the plaintiff as "Boy Who Made Good," [115] the unauthorized publication of a photograph of a nude child born with its heart outside its body,[116] and the publication of a person selling bread on the streets in a motion picture entitled, "Sight-Seeing in New York with Nick and Tony," [117] have been held to be violations of privacy.

The interpretation of what constitutes a picture under the New York Civil Rights Law is liberal. In Young v. Greneker Studios, Inc.,[118] it was held that a manikin in form and features of a living person is a portrait and as such may be restrained from further use and damages suffered compensated.

The use of actresses' pictures in lockets on sale, as for example in the 5 and 10 cent stores, even though a statement is used on the back of the various pictures that the photograph may be replaced with another more to his liking, was held to be use of a picture for purposes of trade.[119]

When, however, pictures of motion picture stars and other promotion material by a commercial printing concern were furnished to theater operators, it was held that there was no violation of privacy, for material of the same character was prepared by the public relations or advertising departments of the various motion picture producers who had the players under contract; the stars' pictures and names were thus sold for public use and so there could be no violation of privacy.[120]

[111] Corliss v. E. W. Walker Co., 57 F. 434, 31 L.R.A. 283 (C.C.Mass.1893).

[112] Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364, 34 L.R.A.,N.S., 1137, 135 Am.St.Rep. 417 (1909).

[113] Almind v. Sea Beach Co., 157 App.Div. 230, 141 N.Y.S. 842 (1913).

[114] Kunz v. Allen, 102 Kan. 883, 172 P. 532, L.R.A.1918D, 1151.

[115] McNulty v. Press Pub. Co., 136 Misc. 833, 241 N.Y.S. 29 (1930).

[116] Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930).

[117] Blumenthal v. Picture Classics, 235 App.Div. 570, 257 N.Y.S. 800 (1932).

[118] 175 Misc. 1027, 26 N.Y.S.2d 357 (1941).

[119] Lane v. F. W. Woolworth Co. 171 Misc. 66, 11 N.Y.S.2d 199, aff., 256 App.Div. 1065, 12 N.Y.S.2d 352 (1939).

[120] Paramount Pictures v. Leader Press, 24 F.Supp. 1004 (D.C.Okl.1939).

In Friedman v. Cincinnati Local Joint Executive Board, etc.,[121] the court of common pleas issued an injunction to prevent damage to property and the taking of pictures of those entering and leaving the plaintiff's restaurant, thus upholding the right of the plaintiff to stop the use of pictures of his customers entering his place of business.

An innocent person may enjoin the inclusion of his picture in a police rogues' gallery, according to the decision in Itzkovitch v. Whitaker,[122] which stated:

> Everyone who does not violate the law can insist upon being let alone (the right of privacy). In such a case the right of privacy is absolute. * * * Where a person is not guilty, is honest, he may obtain an injunction to prevent his photograph from being sent to the rogues' gallery.

North Carolina recognized the right of privacy in Flake v. Greensboro News Publishing Co.[123] The defendant newspaper published the following advertisement:

> Keep that SYLPH-LIKE FIGURE by eating more of Melt's Rye and Whole Wheat Bread, says Mlle. Sally Payne, exotic red-haired Venus—
>
> "Folies de Paree" sparkling Parisian Revue, State Production, NATIONAL THEATER two days only, Mar. 11 and 12.
>
> "Melt's Rye and Whole Wheat Bread will give you the necessary energy, pep and vitality without adding extra weight," says Miss Payne. Melt's Bakery, 314 North Elm St., 1829 Spring Garden St.
>
> Ask for Melt's Bread—Melts in Your Mouth.

In the advertisement there was a picture of the plaintiff showing her wearing a bathing suit. The use of the picture was unauthorized. The court ordered a reversal of the trial court's denial of a motion of nonsuit on the libel count but ordered a new trial on the unauthorized use of the plaintiff's name and photograph.

In Martin v. New Metropolitan Fiction, Inc.,[124] the defendant published a magazine, "True Detective Mysteries," consisting principally of articles and purporting to be true stories of crime, its detection and punishment. In the August 1928 issue there was an article entitled, "Tropic Vengeance," the heading of which continued as follows:

[121] 6 Ohio Supp. 276 (1941).

[122] 115 La. 479, 481, 39 So. 499, 500, 1 L.R.A.,N.S., 1147, 112 Am.St.Rep. 272 (1905).

[123] 212 N.C. 780, 195 S.E. 55 (1938).

[124] 139 Misc. 293, 248 N.Y.S. 359 (1931).

> To get a more accurate idea of what the fate of Blossom Martin was, a study of the picture of Eulogia Lozade, whose photograph appears on the next page may be of help. Note the indications in this man's face. Then study the picture of the girl opposite, and ask yourself what strange fate caused their paths to cross. In the clutches of this man—what chance had she? The horrible fate of beautiful Blossom Martin by Inspector Ernest Van Wagner, Chief of Detectives, Staten Island, as told to Isabel Stephen.

This article was illustrated with pictures of Lozade, Blossom Martin, Inspector Van Wagner, and another photograph with the following explanation:

> Blossom Martin's sister and mother seated in court by Assistant District Attorney McDonald. As Lozade passed close by, on his way to the witness stand, the broken-hearted mother cried out: "I could kill that man with my own hands."

The plaintiff brought an action under Section 50 of the Civil Rights Law, claiming that the defendant used her picture in violation of the statute. The court denied a motion to dismiss the action. The court gave the opinion that although the use of the picture of the plaintiff in no way identified with the perpetration of the crime, the trial was used for purposes of trade to enhance the value of the article from the standpoint of the public. In its opinion the court stated:

> Apparently legitimate use of names and pictures in commercial enterprises depends upon the purpose, viewing the matter from the standpoint of the reaction of the public rather than from the standpoint of the person who uses them. Names and pictures are legitimately used in connection with mere items of news, with matters of history of public men and events, and with matters which are submitted to the public in a way which invites public comment. Even private social affairs and prevailing fashions involving individuals who make no bid for publicity are, by custom, regarded as public property where the apparent use is to convey information of interest and not mere advertising.[125]

In Murray v. Gast Lithographic and Engraving Co.,[126] the New York Court of Common Pleas declined to enjoin the unauthorized publication of an infant's picture on the ground that injury to the father's feelings did not constitute ground for equitable relief. Its position was based on the theory that the body, the reputation, and the property of a person may not be invaded without responsibility, but that injuries to feelings alone must

[125] 139 Misc. 293, 248 N.Y.S. 359, 361.

[126] 8 Misc. 36, 28 N.Y.S. 271, 31 Abb.N.C. 266 (1894).

be vindicated through the sympathy of one's friends or neighbors.

On the contrary, the unauthorized use of a person's picture in a popularity contest conducted in a newspaper was enjoined by the Superior Court of New York City as early as 1893. The decision was based on the recognition of privacy, stating in part:

> Private rights must be respected, as well as the wishes and sensibilities of people * * * where they are content with the privacy of their homes, they are entitled to peace of mind, and cannot be suspended over the press-heated gridiron of excited rivalry, and voted for, against their will and protest.[127]

From *Burton v. Crowell Publishing Co.*,[128] a libel case, an unusual angle relating to privacy arose. In a Camel cigarette advertisement the picture of a jockey was given; the jockey had consented to the use of his name and picture, though had not consented to that particular picture which was used. The picture showed the jockey carrying his saddle and coming from a race to be weighed in. The particular picture, taken from an unusual angle, developed surprising and most embarrassing results. In the picture a white girth was shown falling in such a manner as would seem to be attached to his body. So regarded, the picture became grotesque and obscene, and the legends could be naturally interpreted to match the strange effect. Such a picture was held *prima facie* actionable for libel. This illustrated a case in which the tort of libel and tort of privacy are closely associated.

The use of photographs of persons identified with a public occurrence does not violate the right of privacy; such was the holding in Jones v. Herald Post Co.[129] In this case, the *Herald Post* carried a story of the murder of Thomas Jones and pictures of both Mr. and Mrs. Jones. Mrs. Jones sued on the ground of the violation of privacy. In affirming the action of the lower court in sustaining a demurrer to the privacy count, the court stated:

> Here Mrs. Jones and her husband were on the streets of the city of Louisville. Her husband was stabbed in her presence. It is not denied that she heroically attacked and struck the men who made the assault. On the contrary, she admits that she went to the defense of her husband. Thereafter she was an innocent actor in a great tragedy in which the public had a deep concern. We do not regard the language attributed to

[127] Marks v. Jaffa, 6 Misc. 290, 26 N.Y.S. 908, 909 (1893).

[128] 82 F.2d 154 (C.C.A.N.Y.1936).

[129] 230 Ky. 227, 18 S.W.2d 972 (1929).

> Mrs. Jones as sufficient to add anything to her cause of action. There was no intention to reflect on her. The account was intended to be complimentary. The language attributed to her was such as might have been used by any wife whose husband had been killed before her eyes. It would be going far afield to say that it was calculated to hold her up to contempt, hatred, scorn, or ridicule by her friends and acquaintances, or the public in general.[130]

If a photograph is taken of a prominent person, showing this person on a public street, or in a hotel lobby, there would be no violation of privacy, even in states where privacy is recognized. By entering such a public or semipublic place the prominent or public person contributes himself to the scene.

Where there is a legitimate news interest, one's picture or name may appear in a newspaper without offending the right of privacy.[131] *The Los Angeles Examiner* used the picture of a woman who had committed suicide in a public place; her husband had requested that the picture not be used, but it was held that the husband's right of privacy had not been violated because the woman had become an actor in an occurrence of general news interest to the public.[132] In Middleton v. News Syndicate Co.,[133] an action on violation of privacy resulted because the plaintiff was described in a column known as "The Inquiring Reporter" as a cigarette girl at the Hotel Commodore. It was held that such use of the girl's picture and name did not violate the Civil Rights Act of New York on the ground of privacy; further, it was noted that there was no libel and that no special damages had been alleged.

An action for violation of privacy arose in Myers v. Afro-American Publishing Co.,[134] in which a dancer invoked the New York privacy statute because her picture in the nude was published without her consent. The plaintiff permitted her photograph to be used to illustrate her work as a dancer; it happened that the plaintiff worked also as an artist's model. The photograph actually used was one of her as a nude model, despite the fact that she had given the photograph on condition that the nude photograph be retouched or so covered that it would

130 230 Ky. 227, 229, 18 S.W.2d 972, 973.

131 Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N.E.2d 753 (1940).

132 Metter v. Los Angeles Examiner, 35 Cal.App.2d 304, 95 P.2d 491 (1939).

133 162 Misc. 516, 295 N.Y.S. 120 (1937).

134 168 Misc. 429, 5 N.Y.S.2d 223 (1938).

not offend. The defendant's motion to dismiss the action was denied on the ground that the newspaper had no right to publish the nude photograph without the plaintiff's consent.

Although the case was decided upon jurisdictional grounds rather than upon the merits, it would seem that the facts in Banks v. King Features Syndicate [135] show a violation of privacy. In that case the picture of the pelvic region of a patient was identified with the name of the patient and publication was without her consent. It follows that medical or pathological pictures taken in clinics or hospitals and associated with a particular patient's name may not be published without the patient's consent. In Clayman v. Bernstein [136] it was held that a physician had no right to take photographs of a woman showing facial disfigurement, when neither the woman nor her husband had given consent for such use.

In Barber v. Time, Inc.,[137] the plaintiff recovered damages for the invasion of her privacy by the publication of the plaintiff's name and picture in regard to the treatment of a physical ailment. The patient had not given her consent to the taking of the photograph.

Where an artist's model consents to the use of his picture in a picture of the navy there can be no recovery under the New York Civil Rights Law. In Freed v. Loew's, Inc.,[138] a picture of a sailor was used in a naval motion picture though the poster was retouched by an artist. His complaint was dismissed on the ground that he had consented to the use of his picture. The court held that there was no intent to portray the particular sailor's picture for purposes of advertising; such use was merely incidental in the use of a recruiting picture.

In this connection, it is submitted that there can be no recovery when consent to a picture has been given by consensual act or by written agreement. In an unreported case, an artist's model was used for the advertising of a public health institute in reference to venereal disease. The model was shown as a victim of venereal disease, in one picture portraying him as a sufferer from heart attack induced by the effects of venereal disease and another showing him in a hospital bed. In this case, it would seem that the model knew for what kind of an account he was

[135] 30 F.Supp. 352 (D.C.N.Y.1939).

[136] 38 Pa.D. & C. 543 (1940).

[137] 348 Mo. 1199, 159 S.W.2d 291 (1942).

[138] 175 Misc. 616, 24 N.Y.S.2d 679 (1940).

working and his tacit consent and acceptance of remuneration would preclude him from recovery.

In publishing a group picture for purposes of advertising it is necessary to have the consent of each person whose photograph is produced, so far as such publication would be made in New York where the law of privacy is defined by statute; a member of a dancing team whose likeness was used in a picture of his act but without his individual consent was given judgment in Fisher v. Murray M. Rosenberg, Inc.[139] An individual's picture in a booklet sold at a six-day bicycle race has been held a technical violation of privacy in New York though oral consent had been given. As no special damages were shown, however, the plaintiff recovered only nominal damages.[140] Under the New York law consent for use of a picture in an advertisement must be in writing.

In Garden v. Parfumerie Rigaud,[141] the picture and name of Mary Garden, the opera singer, was used without her consent after she revoked permission which had been in effect for twenty years. An injunction was issued under the authority of the New York Civil Rights Law against further unauthorized use.

In Corliss v. E. W. Walker Co.,[142] relief was denied for the injury to the feelings of the family, but was allowed on the basis of property; however, later when it was shown that the photograph was purchased in a public shop and there was no breach of contract or confidence,[143] a motion to dissolve the injunction was granted.

The defendant in Holmes v. Underwood & Underwood[144] was employed to take pictures at a social function in the plaintiff's home, and an agreement was made that the plaintiff might purchase any of the proofs and negatives of such photographs but that all rights to dispose of these were to be personal property of the plaintiff. The defendant however sold one or more of such pictures to a newspaper of large circulation. It was held that the plaintiff had two good causes of action, one based on a

139 175 Misc. 370, 23 N.Y.S.2d 677 (1940).

140 Miller v. Madison Square Garden Corporation, 176 Misc. 714, 28 N.Y.S.2d 811 (1941).

141 151 Misc. 692, 271 N.Y.S. 187 (1934).

142 57 F. 434, 31 L.R.A. 283 (C.C. Mass.1893).

143 C.C.Mass., 64 F. 280, 31 L.R.A. 283 (1894).

144 225 App.Div. 360, 233 N.Y.S. 153 (1929).

violation of contract and the other based on the New York Civil Rights Law.

Principles may be summarized in regard to the publication of unauthorized photographs as follows:

1. When the photograph is used as part of an advertisement, especially when such use comes within the New York privacy statute, recovery may be made.
2. When the photograph is used without authorization in connection with a work of fiction, recovery may be made.
3. No recovery may be had when the picture is used in a single publication as an incident of a current news item.
4. No recovery may be had when a picture is used in an educational, informative, or entertaining feature story.[145]

If the picture is used without authorization for purpose of promoting the sale of newspaper feature material, there would be a violation of the New York statute,[146] but it is submitted that the distribution of such a picture through a regularly employed picture or news service would not be a violation.

The picture of a street parade or a public event which incidentally showed recognizable persons would not be such a violation, but if a person were featured without his consent, it would seem that under the New York holdings there would be a violation.[147]

[145] Sarat Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N.Y.S. 382 (1937).

[146] McNulty v. Press Pub. Co., 136 Misc. 833, 241 N.Y.S. 29 (1930).

[147] Blumenthal v. Picture Classics, 235 App.Div. 570, 257 N.Y.S. 800 (1932).

CHAPTER 13

CONTEMPT

Sec.
71. Contempt as Inherent Power.
72. Contempt as a Press Restriction.
73. False and Inaccurate Reports.
74. When Defamation Becomes Contempt.
75. Los Angeles Times Cited.
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§ 71. CONTEMPT AS INHERENT POWER

Punishment for constructive contempt not well based in the common law.

Enforcement of legal discipline is inherent in the administration of justice. Without some means of enforcing its judgments, decrees, or orders, courts would be powerless. Development of contempt as a legal weapon can be traced from the twelfth century [1] in the enforcement of judicial rulings and in the punishment of such disobedience as interferes with the administration of justice.

With the growth of printing and journalism there has arisen what has been termed indirect or constructive contempt for out-of-court publications. The power to punish such publications in Anglo-American jurisprudence is founded on Almond's case,[2] in which because of a technicality no judgment was ever rendered. Sir John C. Fox, in his study of the History of Contempt of Court, points out that the notes of Justice Wilmot in this case do not give adequate foundation for acceptance of constructive contempt for out-of-court publications as a part of the common law.[3] There has been nevertheless practical acceptance of the Wilmot doctrine in both England and America, as judicial citations of this authority well show.

Clearly the Wilmot conception of constructive contempt for publication could not have been definitive of the common law

[1] Fox, Sir John C., History of Contempt of Court, p. 1.

[2] Ibid., p. 5 and references there cited.

[3] Ibid., p. 15.

at the time of the adoption of the United States Constitution, for Wilmot's notes were not discovered until 1802.

In principle, a libel is not a contempt unless its publication tends to obstruct the administration of justice. Interpretation of what tends to obstruct justice lies within the province of the judiciary.

Two London newspapers, the *Daily Express* and the *Evening News,* some years ago published articles on an assault with a deadly weapon upon the King. On the ground that these stories prejudiced the defendant's fair trial, each publication was fined $2,500 and costs by the court without a jury trial.[4]

An act declaratory of the law of contempt in the Federal courts, passed in 1831 is the basis of contempt proceedings before Federal judges. It specifies that the power to issue attachments and inflict summary punishments for contempts of court does not extend to any cases "except the misbehaviour of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice." [5] Courts in the several states likewise possess the power to punish for contempt, under authority of inherent power or statute, or both.[6]

In Toledo Newspaper Co. v. United States,[7] comments on proceedings pending in a Federal court were held contemptuous under the authority of the Act of 1831; however, in a strong dissenting opinion Justice Holmes gave the opinion that "so near thereto as to obstruct the administration of justice" means so near as actually to obstruct, and that misbehaviour means more than unfavorable comment or even disrespect.

Journalists realize that if summary process to punish publications as constructive contempts is applied without great care and discretion, the freedom of the press may be seriously threatened.

[4] McCormick, R. R., Freedom of the Press, p. 13.

[5] Act of Mar. 2, 1831, c. 99, 4 Stat. 487.

[6] See 28 Columbia Law Review 554–562.

[7] 247 U.S. 402, 38 S.Ct. 560, 62 L. Ed. 1186 (1918).

§ 72. CONTEMPT AS A PRESS RESTRICTION

When the newspaper is deemed to have interfered with the administration of justice, the paper and its editors are subject to contempt proceedings; either congress or a legislature may cite the press for direct contempt.

Contempt, or want of respect for constituted authority, or an act or omission in disobedience of such authority, may constitute a violation subject to a charge of contempt of court or contempt of legislative authority. The proceeding for contempt is definitely a control of the press, and as shown by the cases may be applied in various types of journalistic procedures.

The possibilities of the press being cited for contempt arise in numerous cases. For example, a reporter might be excluded from the courtroom during a trial, but surreptitiously re-enter the court room, thus violating the order of the court. For this disrespect, the reporter could be cited for contempt. What might be true for a reporter would of course be true also in the instance of a news photographer. In the case of Ex parte Sturm et al.,[8] the appellants were adjudged in contempt of trial court for violation of its orders in regard to the taking of photographs of Richard Reese Whittemore held on an indictment for murder. Shortly before the beginning of the trial in the criminal court of Baltimore, a photographer took a flashlight picture of the prisoner as he was entering the lockup in the courthouse. The noise of the flash was heard by the judge in his private office adjacent to the court room. The judge ordered the photographer brought to his office and further ordered the surrender of the photographic plate exposed a few minutes before. The photographer however handed the judge a blank plate, but the judge thought that the plate given to him was the one taken of the prisoner.

Following the opening of court, the judge stated that he felt that it was not compatible with judicial dignity or the dignity of the administration of law, to allow either the courtroom or the precincts of the court to be used for the taking of pictures; he mentioned that one picture had been taken that morning and had been confiscated. The court declared that the prisoner was in the precincts of the court, under the court's pro-

[8] 152 Md. 114, 136 A. 312, 51 A.L.R. 356 (1927).

tection, and inasmuch as he was unable to protect himself he would be protected by the court. After that announcement William Sturm, a photographer on the staff of the *Baltimore News,* took several pictures secretly with a small camera following an order of his city editor who had previously been informed of the court's ruling in regard to taking photographs. Two of the pictures taken by Sturm appeared in the first edition of the *News* that day, and in the first edition of the *Baltimore American,* published the next morning. Both the *News* and the *American* were published under the same ownership and control.

Upon learning of the publication of the photographs, Judge O'Dunne instituted contempt proceedings against the managing editors of both newspapers, the city editor of the *News,* and the two photographers. Upon appeal the contempt proceedings were upheld. The court in making its decision stated:

> The challenge in this case of the court's right to forbid the use of cameras in the courtroom during the progress of the trial presents an issue of vital importance. If such a right should yield to an asserted privilege of the press, the authority and dignity of the courts would be seriously impaired. It is essential to the integrity and independence of the judicial tribunals that they shall have the power to enforce their own judgment as to what conduct is incompatible with the proper and orderly course of their procedure. If their discretion should be subordinated to that of a newspaper manager in regard to the use of photographic instruments in the courtroom, it would be difficult to limit the further reduction to which the authority of the courts would be exposed.[9]

Analysis of Ex parte Sturm clearly indicates the correctness of the court's decision upon the facts of that case. The court has an inherent power to institute contempt proceedings in order to carry out its orders; further, in Maryland there was legislative authority for summary punishment for contempt.[10]

In that case, the taking of a photograph did create a slight disturbance, but if the incident were multiplied by numerous newspaper photographers, their acts would be disconcerting and interruptive of the orderly administration of justice. However, with the silent flashlight bulbs of modern photography,

[9] 152 Md. 114, 121, 136 A. 312, 51 A.L.R. 356 (1927).

[10] Acts 1853, Code 1939, article 26, section 4, gives as one ground for contempt proceedings: The misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice.

there would not necessarily be any disturbance in so far as the noise of taking the picture would be concerned. On the contrary, there might be considerable disturbance if photographers interrupted the trial proceedings in order to have parties, witnesses, or counsel pose for photographs.

Aside from the disturbance of the court giving time for the taking of the picture, there are two other juridical problems that are perplexing. First, there is the question of justice to the prisoner. In the case of a murder trial, the question may be one of identity of the prisoner; if the witnesses, prior to their appearance at the trial, have seen the photographs of the prisoner, they subconsciously may be more likely to identify the man on trial as the person seen near the scene of the alleged crime on the day on which the crime was charged to have been committed. To allow pictures of the prisoner to be taken at the trial might build up a certainty in the minds of witnesses that the prisoner was the guilty person. On the contrary, one who commits crime must take the risk of identification; the problem is serious when there is more than a bare possibility that the prisoner is innocent.

It is clear that the prisoner should not be subjected to any indignity or risk that would prevent a fair trial. In a notorious criminal case, attracting wide attention, a prisoner may have had his photograph in the newspapers over a period of many weeks, during the period in which he was under suspicion and apprehension; if the prisoner on trial had a criminal record, photographs would likely be in existence in newspaper files (morgues) and would possibly have been used.

The other serious problem in regard to the taking of photographs at a trial is whether the freedom of the press protects the taking of pictures. Pictures concerning current happenings are news. Some newspapers, particularly those specializing in pictorial journalism, as well as picture magazines, portray the news more through the medium of pictures than through the medium of words. If courts do not allow the taking of pictures, even those pictures the taking of which does not disturb the court procedure in any way, such publications would be limited in covering the particular trial.

It is clear that the taking of photographs must not disturb the progress of the trial; for a news photographer to do so would be clearly a contempt of court.

Contempt may be direct or indirect. A direct contempt is one committed within the presence of the court, or so near the court that the violation may be said to be within the confines of the court. An indirect contempt is one committed outside the presence of the court; this type of contempt is known also as a constructive contempt.

The proceedings for contempt may be either civil or criminal. A civil contempt is one affecting the relationship of the parties themselves, as where one party is given certain rights in a court case and the other party disregards the right or rights thus established.[11] A criminal contempt is a summary proceeding in which punishment may be meted out to one who interferes with the administration of justice by disrespect to the decorum of the court, or by interference with the impartial conduct of a case through such means as prejudicing the jury.[12]

By statute, both houses of Congress have the power to punish for contempt of their respective authority. A state legislature may punish for contempt.

The power of a court of justice to punish for direct contempt is inherent in the court; this is but the authority to enforce its rules, decrees, and orders.

The court has authority over its own affairs; it can of course bar reporters from the courtroom, punish any disturbance of the proceedings, and prohibit publication of certain proceedings. Any disobedience to the court's orders subjects the offender to citation for contempt of court. Contempt as a weapon to enforce a court's orders is the basis of all legal procedure,[13] whether the contempt is civil contempt for disobedience to court orders, or the enforcement of process, or for criminal contempt for acts which delay the judicial procedure, or for out-of-court contempt.

Citation for contempt may arise from any one of the following causes:

1. Any disturbance in the courtroom.
2. Any disobedience of a court's order.

[11] People v. Soloman, 150 Misc. 873, 271 N.Y.S. 136 (1934); Donato v. U. S., 48 F.2d 142 (C.C.A.N.J.1931); Seaboard Air Line R. Co. v. Tampa Southern R. Co., 101 Fla. 468, 134 So. 529 (1931).

[12] In re Magen, 18 F.2d 288 (D.C. N.Y.1926); Wilson v. Prochnow, 359 Ill. 148, 194 N.E. 246 (1935).

[13] Fox, Sir John C., History of Contempt of Court, p. 1.

3. Refusal to testify as to a news source if a reporter is subpoenaed to reveal in a trial the source of news, unless such refusal is permitted under modernized rules of evidence.

4. Any publication of a news story, picture, article, or editorial which tends to obstruct justice, or which is a clear and present danger to the administration of justice, particularly during the pendency of a case.

5. Any publication which tends to scandalize the court, thus lowering the public's confidence in the integrity of the court, particularly during the pendency of a case.

6. Any grossly false, or inaccurate report of a court trial prejudicial to the court.

Use of contempt to enforce the court's orders or to punish actual disturbance within the confines of the court and its adjacent surroundings is just; such practice is well recognized.[14]

Contempt for out-of-court activities raises the vital issue of trial by newspaper. This class of contempt may be divided generally in three classes, as follows: (a) False and grossly inaccurate reports of court proceedings; (b) publications which whether true or false have a reasonable tendency to interfere with the orderly administration of justice, or publications which are in fact a "clear and present danger" to the administration of justice; and (c) publications which scandalize the courts, the judges, or other officers of the court, counsel, witnesses or litigants.[15]

There are undoubtedly many types of circumstances which would seem to justify the exercise of the power to cite for contempt when publications give purposely false or grossly inaccurate reports of court proceedings. But with such power, a judge may overstep his impartiality and judicial equanimity, seriously threatening the right of free discussion of public affairs when these are involved in litigation.

When the power to cite for contempt is used to stifle criticism of the courts themselves, or when a court cites for what is termed scandalizing the court, the use is akin to summary punishment for seditious libel.[16]

[14] Ex parte Sturm, 152 Md. 114, 136 A. 312, 51 A.L.R. 356 (1927); In re Seed, 140 Misc. 681, 251 N.Y.S. 615 (1931); Ex parte Holbrook, 133 Me. 276, 177 A. 418 (1935).

[15] See 48 Yale Law Journal 60 (1938).

[16] Nelles, Walter, and King, Carol Weiss, Contempt by Publication in the United States, 28 Columbia Law Review 406 (1928).

Justification for summary punishment for contempt has often been credited to William Blackstone, who stated:

> The contempts that are thus punished are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else consequential, which (without such gross insolence, or direct opposition) plainly tend to create an universal disregard of their authority.
> * * *
>
> Some of these contempts may arise in the face of the court; as by rude and contumelious behavior; by obstinacy, perverseness, or prevarication; by breach of the peace; or any wilful disturbance whatever; others, in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules of process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts (or even true ones, without proper permission) of causes then depending in judgment; and by any thing, in short, that demonstrates a gross want of that regard and respect, which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.[17]

Blackstone undoubtedly depended for his opinion upon the authority of Sir J. E. Wilmot in his extra judicial opinion in King v. Almon, which concerned a libel upon the Chief Justice, Lord Mansfield. In fact, because of an error in the title of the case and a change in the ministry, this case was abandoned; however, this opinion acquired the effect of a precedent-making decision and has had a profound effect upon both English and American judicial thinking and opinion.[18] The opinion was written in 1765 but was not published until 1802.

Use of summary punishment for criminal contempt of the Court of Chancery was used by the Star Chamber until that body was abolished by Parliament in 1641. Following the abolition of the Star Chamber, punishment for contempt was used by the Court of the King's Bench or the law side of the Court of Chancery,[19] In fact, Lord Hardwicke in 1742, in giving his decision in Roach v. Garvan and Read & Huggonson's case,[20] established the Chancery's practice of punishment for criminal contempt by the summary process, although Wilmot apparently did not know about Lord Hardwicke's dictum, for the opinion in Roach v.

[17] 4 Blackstone 284, 285.

[18] Fox, Sir John, History of Contempt of Court, pp. 5–8.

[19] Ibid., p. 117.

[20] Ibid., pp. 104, 105.

Garvan was not published until two years after Wilmot wrote his opinion for Almon's case.[21] In any event, it was Lord Hardwicke who fastened the summary process for criminal contempt upon the common law.

Prior to the passage of the Fox Libel Act in 1792, the question of libel was for the judge, not the jury; however, later decisions upheld the Wilmot theory for summary punishment by citation for contempt when a judge was libeled, thus depriving the defendant of a trial by jury.[22]

An imposing line of authorities and decisions upholds the theory that courts have the inherent power to punish for out-of-court contempt, particularly when a cause is pending before a specific tribunal, so that there would be a normal tendency to interfere with the administration of justice, or bring the integrity of the court itself into dispute.

There arises, in this problem of summary punishment for out-of-court contempt, a direct conflict between freedom of the press and the integrity of the courts. If the press cannot discuss public questions involved in court litigation until after final disposition of the particular case or until the time limit for appeal has expired without an appeal being made, it would seem that the qualified right of liberty of the press would be seriously restricted. The difficulty does not lie in the accurate reporting of trials, but rather with the editorial criticism of the position taken by a court in its ruling or decision in a particular case. The publisher of a particular newspaper might believe that in a certain instance the law is incorrect and an unjust hardship on one party to a case under trial; his editorial writers might show, at their peril, the injustice which they believe to exist in the decision of the court; further, they might urge that the law should be changed and in so doing prejudice the selection of a jury for similar cases scheduled for early hearing. Such editorial discussion may prejudice the public and particularly the veniremen drawn for tentative jury duty.

Respublica v. Oswald [23] was the first American case in which punishment was meted out for out-of-court contempt.[24] Eleazer Oswald, editor of the *Independent Gazette*, who opposed the ratification of the Federal Constitution, published what was alleged

[21] Ibid., p. 22.

[22] Ibid., p. 40.

[23] 1 Dal. 319, 1 L.Ed. 155, 1 Am. Dec. 246 (1788).

[24] Nelles and King, Contempt by Publication in the United States, 28 Columbia Law Review 409 (1928).

to be a libel on the master of a ladies' seminary. Oswald was fined and imprisoned. Four years later the historic case of Respublica v. Passmore[25] further upheld the right to punish for out-of-court contempt. A vessel owned by Passmore was damaged and shortly thereafter a suit was successfully brought for loss of the vessel against the underwriters who filed a bill of exceptions, thus staying execution. Passmore posted a notice in the City Tavern charging the underwriters with quibbling and called Bayard "a liar, a rascal and a coward." Passmore was found guilty and sentenced to fine and imprisonment.

The Wilmot theory of inherent right of the court to cite for contempt for out-of-court publication had an influential effect upon American judicial decisions. This theory was cited in the impeachment trial of Judge James H. Peck before the United States Senate in 1831. Judge Peck had held L. E. Lawless, an attorney, for contempt on the ground that Lawless had caused to be published a libel on the judge. Lawless had been sentenced by Judge Peck to 24 hours' imprisonment and suspended from practicing law for 18 months. Judge Peck was acquitted by a vote of 22 to 21.[26]

The Peck impeachment further emphasized the importance of the Wilmot theory. In Neel v. State,[27] for example, the court summarized its right as follows:

> The right to punish for contempts, in a summary manner, has been admitted as inherent in all courts of justice, and in legislative assemblies, founded upon great principles, which are coeval, and must be co-existent with the administration of justice in every country—the power of self-protection. And it is only where this right has been claimed to a greater extent than this, and the foundation sought to be laid for extensive classes of contempts not legitimately and necessarily sustained by these great principles, that it has been contested. It is a branch of the common law, brought from the mother country and sanctioned by our constitution. The discretion involved in the power is necessarily, in a great measure, arbitrary and undefinable, and yet, the experience of ages has demonstrated that it is compatible with civil liberty, and auxiliary to the purest ends of justice, and to the proper ex-

[25] 3 Yeates 441, 2 Am.Dec. 388 (1802).

[26] Stansbury, Arthur J., Report of the Trial of James H. Peck; this report published in 1833 was made available to the author through Floyd C. Shoemaker, editor of the Missouri Historical Review, issued by the State Historical Society of Missouri.

[27] 9 Ark. 259, 263, 50 Am.Dec. 209 (1849).

> ercise of the legislative functions, especially when these functions are exerted by a legislative assembly.

State v. Morrill,[28] Patterson v. Colorado [29] and Toledo Newspaper Co. v. U. S. [30] are outstanding authorities on summary punishment for out-of-court contempt despite legislative action to limit such summary proceedings and an enlightened judicial tendency in more recent years to realize the dangers in trial by newspaper.

A charge published in a newspaper that an alleged murderer had bribed the state supreme court was the basis for the summary contempt proceedings in the Morrill case. The court was faced with a state statute limiting contempt proceedings to certain specified acts, which did not include an out-of-court publication. This statute on contempt was as follows:

> Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others:
>
> *First.* Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. *Second.* And breach of the peace, noise or disturbance, directly tending to interrupt its proceedings. *Third.* Willful disobedience of any process or order lawfully issued, or made by it. *Fourth.* Resistance willfully offered, by any person, to the lawful order or process of the court. *Fifth.* The contumacious and unlawful refusal of any person to be sworn as a witness, and when so sworn, the like refusal to answer any legal and proper interrogatory.[31]

The court, however, held that the statute was not binding, and pointed out that the legislature meant merely that citation for contempt was unnecessary except in the specified cases, quoting the earlier decision in Neel v. State.[32]

In its justification for its decision, the court ironically commented upon the situation which would obtain if the judge were not permitted to cite for an out-of-court publication charging the court with corruption and advising the community to disregard the particular decision. This ironical commentary was as follows:

[28] 16 Ark. 384 (1855).

[29] 205 U.S. 454, 27 S.Ct. 556, 51 L. Ed. 879, 10 Ann.Cas. 689 (1907).

[30] 247 U.S. 402, 38 S.Ct. 560, 62 L. Ed. 1186 (1918); U. S. v. Sanders, 290 F. 428 (D.C.Tenn.1923).

[31] 16 Ark. 384, 388 (1855), quoting Digest. Chap. 36, sec. 1, approved Feb. 28, 1838.

[32] 9 Ark. 259, 50 Am.Dec. 209 (1849).

> If an ignorant, or impolite man stalks into a court-house with his hat on, or makes a noise about the door, or disobeys process, all agree that he may be punished for contempt; but if a man has an important cause pending in court, and willing to resort to desperate measures to succeed, publishes, on the eve of the trial, a libel, alleging that the judge has been bribed to charge the jury against him, and that all the witnesses, who are to appear on behalf of the opposing party, have been corrupted, and are unworthy of credit, it is no contempt, and the judge must labor under the embarrassment of sitting in the case, under such circumstances, with his mouth closed! Or if a judgment is rendered against a man, as soon as the judge leaves the bench, he is met at the door, insulted and assaulted by the party, in consequence of his decision, and then a publication is made in a newspaper charging him with corruption in rendering the judgment, and calling upon the community to disregard, and resist its execution, and yet this is no contempt.[33]

Contempt must be toward the court engaged in a judicial duty.[34] It is essential that the publication in question will have a reasonable tendency or at least such a tendency [35] that there will be likely a clear, immediate danger to the orderly administration of justice.[36] If the rights of litigants might be adversely affected through an out-of-court publication there would be ground for citation for contempt.[37] It must appear, according to Nixon v. State,[38] that the administration of justice would be embarrassed or impeded before the author should be held for contempt.

The newspaper having the contemptuous article may be published either in the city where the court is sitting,[39] or in any other city within the jurisdiction of the court.[40] It is not necessary that the article alleged to be in contempt of the court come

[33] 16 Ark. 384, 407 (1855).

[34] Dunham v. State, 6 Iowa 245, 6 Clarke 245 (1858).

[35] Conley v. U. S., 59 F.2d 929 (C. C.A.Minn.1932); Times-Mirror Co. v. Superior Court in and for Los Angeles County, 15 Cal.2d 99, 98 P.2d 1029 (1940).

[36] Schenck v. U. S., 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919); concerning the clear and present danger test on press restrictions see Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); Schneider v. State of New Jersey, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

[37] State v. Nelson, 29 N.D. 155, 150 N.W. 267 (1914).

[38] 207 Ind. 426, 193 N.E. 591, 97 A. L.R. 894 (1935).

[39] U. S. v. Providence Tribune Co., 241 F. 524 (D.C.R.I.1917).

[40] Froelich v. U. S., 33 F.2d 660 (C. C.A.Minn.1929); People v. Wilson, 64 Ill. 195, 16 Am.Rep. 528 (1872).

to the attention of either the judge [41] or the jury.[42] It is contempt to criticize a judicial act so as to interfere with the administration of justice, but it is not contempt to criticize adversely a purely ministerial act of the court.[43]

If a publication does not operate to defeat the orderly administration of justice or definitely to prejudice the rights of the litigants, such a publication although an inaccurate report of litigation should not be constructive contempt.[44] To be constructive contempt there must be no doubt of the harmful possibility of the publication on pending cases.[45] The publication must be explicit in its possible damaging effect.[46] It has been held that a publication may be contemptuous if such publication definitely refer to a cause pending in a court though the suit itself is not expressly mentioned.[47]

In Patterson v. State of Colorado ex rel. Attorney General,[48] the editor and publisher of a Denver newspaper were found guilty of contempt on the ground that pending litigation articles were published which questioned the motives of the supreme court and that two of the judges of the supreme court had obtained their places on the bench as part of a scheme to seat certain Republican candidates. Justice Holmes in his opinion pointed out, "When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." [49]

Toledo Newspaper Co. v. United States [50] long has been an established authority for out-of-court contempt. A brief review of the facts reveals that prior to 1914 in the city of Toledo, Ohio, a heated controversy arose over the street car system. The company's franchise expired and the city council permitted the road

[41] U. S. v. Toledo Newspaper Co., 220 F. 458 (D.C.Ohio 1915); aff., 237 F. 986 (C.C.A.Ohio 1916); Toledo Newspaper Co. v. U. S., 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186 (1918).

[42] Lindsley v. Superior Court in and for Humboldt County, 76 Cal. App. 419, 245 P. 212 (1926).

[43] Statter v. U. S., 66 F.2d 819 (C. C.A.Alaska 1933).

[44] Morrison v. Moat, 4 Edwards' Chancery Reports, N.Y., 25 (1839).

[45] Cheadle v. State, 110 Ind. 301, 11 N.E. 426, 59 Am.Rep. 199 (1887).

[46] Ex parte Spooner, 5 City Hall Recorder, N.Y., 109 (1820).

[47] Bayard v. Passmore, 3 Yeates 438 (Pa.1802).

[48] 205 U.S. 454, 27 S.Ct. 556, 51 L. Ed. 879, 10 Ann.Cas. 689 (1907).

[49] 205 U.S. 454, 463, 27 S.Ct. 556, 51 L.Ed. 879, 10 Ann.Cas. 689.

[50] 247 U.S. 402, 38 S.Ct. 560, 62 L. Ed. 1186 (1918).

to operate upon a day-to-day basis and an ordinance established three cent fare to go into effect March 28, 1914. In retaliation the company sought an injunction on the ground that the ordinance was confiscatory. One of the local newspapers, the *News-Bee,* upheld the popular side of the issue in both its news stories and editorials. At the time a motion was made for the temporary injunction, the *News-Bee* published a cartoon showing a moribund man in bed with friends at the bedside, and one of these characters saying, "Guess we'd better call in Doc Killits." While the controversy grew bitter in the city and the *News-Bee* continued to publish editorial material on the issue, the judge (Killits) took no action until late in September when he directed that an information be filed against the newspaper covering the period from March 24 through September 17. The case was tried summarily without a jury in December with the result that a considerable fine was imposed, despite the stress of the Federal contempt statute of 1831 cited by the defense. This statute limited Federal courts to use the contempt process only when there was misbehaviour in the presence of the courts or so near thereto as to obstruct the administration of justice, the misbehaviour of officers of the court, or disobedience or resistance to a lawful writ, decree or command of the said courts.

The legal philosophy of out-of-court contempt as expressed in Toledo Newspaper Co. v. United States,[51] may be summed up as follows:

> The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing. * * * Not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test.

The attempt by Congress and the legislatures of the several states to limit contempt to certain specific classifications has not been universally successful. Both the legislative and judicial

[51] 247 U.S. 402, 419–421, 38 S.Ct. 560, 62 L.Ed. 1186; earlier in the decision the test is expressed as follows: "The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty."

branches of government are coordinate. While the legislative branch of any of our governmental units has the power to make the law, the judicial branch has by its very nature and for its protection certain inherent rights in order to enforce its orders, rules, writs, or decrees. But how far can the legislature go in limiting courts in their administration of justice?

As has been already indicated, the Federal courts have not always limited themselves within the confines of the specifications set for contempt proceedings; necessarily, some leeway must be left to the courts themselves.

Thirty-six states, at one time or another, have passed statutes which have concerned contempts by publication, according to an exhaustive survey of laws covering contempt by publication, as published in 1928.[52] These states include Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin.

Of the states that have enacted statutes limiting contempt by publication, but four, Kentucky, New York, Pennsylvania, and South Carolina, have experienced no judicial subversion.[53] In these four states, the statutes on contempt by publication are more than 100 years old.[54]

States in which the courts have held either that they have inherent power, so that any statutory declaration is not regarded as exclusive or a limitation upon the inherent power of the courts, include the following states: Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Montana, Nevada, New Jersey, Virginia, and West Virginia.[55]

The scope of this superstatutory power, as interpreted by various state courts, indicates that the independence of the courts to protect their own interests is well ingrained in the judicial thinking of a considerable number of jurists in courts of the last resort.

[52] Nelles, Walter, and King, Carol Weiss, Contempt by Publication in the United States—Since the Federal Contempt Statute, 28 Columbia Law Review 525, 554ff. (1928).

[53] Herman, Robert E., Recent Limitations of Free Speech, 48 Yale Law Journal 54, 59 (1938).

[54] Nelles and King, 28 Columbia Law Review 525, 543 (1928).

[55] Ibid., 554ff.

Even in states where there is a strict definition of what constitutes contempt, it would seem that under special circumstances there is precedent for the court considering its inherent power above the legislative enactment. After all, the law in the last analysis, as applied to specific cases, is what the courts declare valid and applicable.

The general principles of summary punishment for out-of-court contempt by publication may be noted as follows:

1. The publication must clearly have a reasonable tendency to impede the administration of justice, or be such that there is a clear, immediate danger to judicial administration or the rights of litigants in a pending case.
2. The publication must be directed toward the court rather than be a report or fair comment upon an action before the court.
3. The publication must have taken place while the case is pending.
4. The intent of the publisher does not absolve him from citation for contempt. If there is an absence of intent, the punishment will likely be nominal; if there is clear intent back of the allegedly contemptuous article, punishment will be more severe.
5. The action for contempt is taken by the judge without any factual determination by a jury.
6. Truth of the publication is not necessarily a defense.

The element of pendency is essential in contempt cases. If litigation is pending, that is, if the litigation has not been finally determined, any publication of the facts of the case or any comment on the case which would have a tendency to interfere with the orderly judicial determination of the controversy, constitutes constructive contempt.[56] The litigation must be such that it come rightfully within the jurisdiction of the court in which it is pending, or be a case over which the court may assume jurisdiction.[57]

The question arises as to the length of time a case is pending. When does pendency begin? When does pendency end? The answer to the first question is academic, for, so far as the press is concerned, the case does not usually begin until the case opens before the trial judge, but in some jurisdictions the judicial

[56] Hollingsworth v. Duane, Fed. Cas.No.6,616 (1801); Cheadle v. State, 110 Ind. 301, 11 N.E.2d 426, 59 Am. Rep. 199 (1887); Cooper v. People, 13 Colo. 337, 373, 22 P. 790, 6 L.R.A. 430 (1889); State v. Sefrit, 84 Wash. 345, 146 P. 804 (1915); Ex parte Lindsley, 75 Cal.App. 122, 241 P. 934 (1925); State v. Lovell, 117 Neb. 710, 222 N. W. 625 (1929).

[57] In re Pacific Tel. & Tel. Co., 38 F.2d 833 (D.C.Cal.1930).

process is considered started when the complaint is filed with the clerk of the court. The answer to the second question causes more difficulty, for as an important case develops, more items of newsworthy interest come to light. When the judge of a trial court gives his decision in a civil case, the end has not been reached for there may be granted a motion for a new trial, or the case may be appealed upon a writ of error or come before an appellate court upon a writ of certiorari. Even when the highest court in a jurisdiction gives its decision, there may be a petition for a rehearing. Until the motion for a rehearing is denied by the highest court in the jurisdiction and the case is ordered returned to the trial court for execution of the decision, the case is still technically pending.[58]

In a criminal case, if the verdict of the jury acquits the prisoner in a fair trial, the case is then ended, for one charged with crime cannot under the constitutions of the several states and the Federal Constitution be twice placed in jeopardy for the same offense.

The press, especially in its investigational activities, encounters the danger of legislative contempt when either Congress or a legislature begins an investigation. If the press refuses to divulge information requested in regard to legislation being proposed, the legislative or congressional body may cite for contempt; through constitutional guaranty investigators, special writers, or reporters need not incriminate themselves so far as to be involved criminally, but their refusal to divulge information requested when the legislative body acts within its constitutional authority in investigating or disciplining members and in ascertaining facts relative to legislative powers constitutes a legal hazard, which however it has been held does not violate freedom of the press.

The legislative power to cite for contempt derives its force from the power possessed by the English Parliament, on the basis of which both the several legislatures and the Congress were modeled.[59] Both the rights to summon persons and to cite for contempt come within this category, although such powers may not be expressly stated. Congress has the delegated authority to expel members and to punish for disorderly conduct; no limita-

[58] McDougall v. Sheridan, 23 Idaho 191, 128 P. 954 (1913); Sullivan, H. W., Contempts by Publication, pp. 23, 24.

[59] Radin, Max., Anglo American Legal History, pp. 63, 64.

tions are imposed upon Congress in its punishment for either disorderly conduct or contempt but in Marshall v. Gordon,[60] it was held that the punishment imposed could not be extended beyond the session in which the contempt occurs.

To the press, the question of contempt on nonmembers of a legislative body becomes extremely important, but of course the question of possession of the power to punish contempt at all should be understood, whether in its application to members or nonmembers of a legislative body.

The Supreme Court has conceded to Congress the power to punish nonmembers for contempt when there occurs "either physical obstructions of the legislative body in the discharge of its duties, or physical assault upon its members, for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, for the prevention of members from attending so that their duties might be performed, or finally, for refusing with contumacy to obey orders, to produce documents or to give testimony which there was a right to compel." [61] In Kilbourn v. Thompson,[62] however, it was held that no witness could be punished for his contumacious act in refusing to give information unless the subject matter of the inquiry is one in which either house has jurisdiction. It is considered that Congress would have jurisdiction in seeking information on legislation to be enacted, in seeking information concerning a question of the expulsion of one of its members, or in inquiring about the qualifications and election of a new member.[63]

Under certain circumstances there may be contempt of a semi-judicial administrative body like the Securities and Exchange Commission, the Interstate Commerce Commission, or the Federal Trade Commission. State public utility, tax, and other commissions, which have power to subpoena witnesses to testify in hearings before such bodies, might be included in this classification. It is doubtful whether such bodies have authority to cite for contempt; clearly they have no such authority based on common law. It is submitted that these bodies may apply to the courts for an order directing a person who has refused to answer

[60] 243 U.S. 521, 37 S.Ct. 448, 61 L. Ed. 881, L.R.A.1917F, 279, Ann.Cas. 1918B, 371 (1917).

[61] Ibid., 243 U.S. 543, 37 S.Ct. 448, 61 L.Ed. 881, L.R.A.1917F, 279, Ann. Cas.1918B, 371.

[62] 103 U.S. 168, 190, 26 L.Ed. 377 (1880).

[63] Sinclair v. United States, 279 U. S. 263, 49 S.Ct. 268, 73 L.Ed. 692 (1929).

a commission's subpoena to appear before the commission or one of its examiners for examination. Refusal to comply with the court's order may then be cited as contempt of the court's order. Such essentially is the provision of the Securities Act of 1933, as amended in 1934.[64]

§ 73. FALSE AND INACCURATE REPORTS

Grossly misleading reports of court cases are clearly contemptuous.

False and grossly misleading reports of court proceedings are contemptuous.[65] In publishing an article about a case to be tried, material to be used as evidence, giving samples of handwriting of the accused and interviews with experts on the various angles of the case, would be an act of contempt. The publication of these details could easily be seen and read by prospective jurors so that it might be difficult to obtain a fair trial.[66]

The editor and publisher of the *Spokane Press* were found guilty of contempt for the publication of the following story:[67]

Rotten!

Alone in a man-filled court room, Gladys Moore was put through a disgusting rigmarole, by tittering and smirking attorneys in Judge Blake's court, Friday afternoon.

The girl had charged James Ballmaine with having assaulted her. Prosecutor Jack White and Attorney Bill Donovan took turns questioning her—questions of the most personal nature.

It was "rich stuff" for the onlookers, among whom were boys of tender years.

Donovan and White took it lightly, for they smiled and winked at friends in the crowd.

The Press knows nothing about Gladys Moore, but the Press knows that such a thing as this shouldn't be aired in open court. Common decency should have prompted Judge Blake to call the case in chambers and to have reprimanded the attorneys for their failure to realize that the thing was deadly serious.

Also, boys should be kept out at such times.

[64] Sec. 22 (b), 15 U.S.C.A. § 77v(b).

[65] In re Chadwick, 109 Mich. 588, 67 N.W. 1071 (1896); In re San Francisco Chronicle, 1 Cal.2d 630, 36 P.2d 369 (1934).

[66] Globe Newspaper Co. v. Commonwealth, 188 Mass. 449, 74 N.E. 682, 3 Ann.Cas. 761 (1905).

[67] State v. Angevine, 104 Wash. 679, 177 P. 701 (1919).

This report was found to be grossly inaccurate and highly exaggerated.

The *News-Scimitar* of Memphis published the following story concerning court action in a wills case:

COURT ORDERS NEWS SUPPRESSED

Injunction Served on the News-Scimitar Requiring that Mysterious Affidavit be Withheld from Public

Document Locked in Vault

Mysterious affidavits pertaining to the Cloth will case, which were filed Monday morning in the office of the circuit court clerk, resulted in the issuance of an injunction by Judge Pittman, who is trying issues of the "missing pages" will of the late Mrs. Caroline Cloth. The order restrains any of the newspapers in the City of Memphis from publishing directly or indirectly, any information pertaining to such matters.

The nature of the affidavits remains as a profound secret. On the order of Judge Pittman they were placed in a vault in the circuit court clerk's office, and were not accessible to the News-Scimitar Monday. As arguments in the "missing pages" will case had already been started, and testimony concluded three days ago, the affidavits were not admitted as evidence before the jury.

"J. H. Lenow," mentioned in Judge Pittman's injunction, is supposed to have been a subscribing witness to the "missing pages" will. Attorney J. H. Malone, who filed the affidavits, represents counsel opposing the will.

It is understood that Judge Pittman's order to enjoin publication of the affidavits was done with the intention of preventing an exposure of the document's allegations, which were given free circulation on the streets Monday by gossipers. Both sides agreed to the ruling, and the affidavits were accordingly ordered withheld from the public.

The story was held contemptuous in the circuit court, though the decision was reversed in the court of civil appeals, which in turn was reversed by the state supreme court, thereby sustaining the original citation for contempt in the circuit court.[68]

[68] Tate v. State ex rel. Raine, 132 Tenn. 131, 177 S.W. 69 (1915).

The editor of the *Western Progressive* was found guilty of contempt for the publication of the following story:

> **Four Supreme Court Judges Upheld Bank's Fraud**
>
> Bankers who practice fraud upon their old clients and customers, cannot be reached for damages when the fraud is discovered. So ruled four justices of Montana's supreme court this past week in one of the most sensational decisions subverting the rights of innocent investors, ever written into the records of a Montana court. The four judges in effect said that any customer or client of a bank who relies upon the bankers' statements in purchasing securities, cannot come back upon that banker for damages if subsequently it is discovered that the statements were lies and the deal conceived and executed in fraud.

The sentence was stricken however, when the editor apologized, disclaiming any intent to hinder the administration of justice.[69]

Publication of a story or article concerning the grand jury is an indirect contempt when there is a likelihood that the administration of justice might be impeded thereby.[70] Even though a particular investigation has been suspended, a story thereon reflecting adversely upon the grand jury before it has been discharged from service is contemptuous.[71] A defamatory story about a member of the grand jury would not be a contempt if the story in no way impeached his capacity or conduct.[72] However, a story which so interferes with the petit jury that the orderly administration of justice might be obstructed would be contemptuous. When a newspaper publishes a story openly charging a defendant in a criminal trial as a felon, and the court is thereby impelled to discharge the jury, such a publication constitutes a contempt of court.[73] It is not necessary that the jurors read the story; it is sufficient if the story is published and possesses the tendency to interfere with their duty as unprejudiced members of the jury.[74]

[69] In re Nelson, 103 Mont. 43, 60 P.2d 365 (1936).

[70] Sauer v. Andrews, 115 Cal.App. 272, 1 P.2d 997 (1931); Dale v. State, 198 Ind. 110, 150 N.E. 781, 49 A.L.R. 647 (1926).

[71] Fishback v. State, 131 Ind. 304, 30 N.E. 1088 (1891).

[72] Ex parte Spooner, 5 City Hall Recorder (N.Y.) 109 (1820).

[73] In re Independent Pub. Co., 228 F. 787 (D.C.Mont.1917), aff., 240 F. 849 (C.C.A.Mont.1917); State ex rel. Phelps v. Judge of Civil District Court, 45 La.Ann. 1250, 14 So. 310, 40 Am.St.Rep. 282 (1895); Field v. Thornell, 106 Iowa 7, 75 N.W. 685, 68 Am.St.Rep. 281 (1898).

[74] Lindsley v. Superior Court of California for Humboldt County, 76 Cal.App. 419, 245 P. 212 (1926); Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N.E. 445, 44 L.R.A. 159, 70 Am.St.Rep. 280 (1899).

If a newspaper publishes a statement by the defendant which contradicts testimony in a pending case, so in effect making out the witness a perjurer, there would be contempt of court.[75] In fact, the publication of any story or article reflecting upon the capacity or honesty of witnesses during a pending trial, in such a manner that the orderly administration of the trial would be disrupted, could justify a citation for contempt.[76]

§ 74. WHEN DEFAMATION BECOMES CONTEMPT

When court is scandalized so that tribunal is brought into such disrepute that judicial administration is threatened, judge may institute contempt proceedings.

Although any publication or other act which tends to hinder or embarrass the administration of justice or to lessen a court's dignity or authority may be a contempt of court,[77] if committed in reference to a pending case, the public has the right to criticize judicial opinions,[78] or take issue with its conclusions of law or its conceptions of the particular facts, so long as these criticisms are made in good faith with no intention to lessen the respect to which a court is entitled.[79] Under ordinary circumstances the court does not concern itself with personal attacks or interfere with the right to criticize.[80] When the criticism takes the form of a defamatory statement in reference to a pending case, a court possesses the power to institute contempt proceedings.[81]

In an original proceeding the Washington Supreme Court held that the following criticism of the court in the *Tacoma Sun* was a constructive contempt: [82]

> The Supreme Court of this state has again eased its conscience, if it ever had any to ease, by its infernal rotten decision in the Tacoma warrant case. * * * (naming a member of the court) can now sit snugly up alongside some

[75] In re Simmons, 248 Mich. 297, 226 N.W. 907 (1929).

[76] Field v. Thornell, 106 Iowa 7, 75 N.W. 685, 68 Am.St.Rep. 281 (1898).

[77] People v. Sherwin, 334 Ill. 609, 166 N.E. 513 (1929).

[78] State v. Breckenridge, 126 Okl. 86, 258 P. 744, 53 A.L.R. 1239 (1927).

[79] In re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A.,N.S., 572 (1908).

[80] U. S. v. Craig, 279 F. 900 (D.C.N.Y.1921). In re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A.,N.S., 572 (1908); State ex rel. Pulitzer Pub. Co. v. Coleman, 347 Mo. 1239, 152 S.W.2d 640 (1941).

[81] State v. Frew, 24 W.Va. 416, 49 Am.Rep. 257 (1884).

[82] State v. Tugwell, 19 Wash. 238, 52 P. 1056, 43 L.R.A. 717 (1898).

other supreme simpletons, and suck the hind teat of plutocracy. It is said that he changed his mind. Suffering saints, who ever made a charge that he had a mind to change? It is true, he voted the other way when the case was up before; but nobody ever accused him of having a mind; and even if they did, after reading the decision in the warrant case referred to, which he is supposed to have written, they would know that the accusation had no foundation, and could not be substantiated. This decision is only remarkable for its malignant, dishonest, and damnable distortions of, not only the law, but also the facts. It states the facts shockingly contrary to the truth, as shown by the record in the case, as will be seen by the dissenting opinion that will soon be filed. It is the conception of an ass, a lean-witted, senile leripoop, who no doubt thinks he would rather be rich than be right. We speak of * * * more particularly because he flopped. What made him flop he knows best, but everyone else has a good idea. There is only one thing about * * * that pleases me, and that is his term soon ends, and he will be relegated to that everlasting oblivion that awaits all of these last rotten articles of Republicanism. How long, O Merciful Creator of the Universe, are we to still suffer for the misdeeds of dishonest, corrupt, and disreputable public servants? The people of Tacoma have lived in a wild and reckless revel of Republican rule. They have drunk deep from the foul cup that folly has filled with perfumed poison and held to trusting lips, while the sweet, sensuous song sung by Satan's sirens lulled the senses to fancied rest, security, and safety as they plunged headlong into the frightful chasm of debt, at the bottom of which they will find destitution, destruction, dishonor, and death. While yet money can be raised, our citizens ought to erect a monument in memory of the past, to stand as a solemn warning to the future. The pedestal or base should be of busted banks. Six stalwart representatives of Republicanism —such say, as Boggs and McCauley, Hedges and Holmes, Shane and McKane—should stand shoulder to shoulder, with hands clasped and eyes raised, with a look of envious emulation at the central figure yet above them all. And that figure should be, * * * on the top of a long shaft straddling the American eagle, in one hand a bunch of illegal warrants, and in the other a double barrelled horse pistol, as he commands fair Tacoma to kneel down and take one more dose of the vile, nauseating stuff, distillations of Republican rottenness, that this Supreme Court has fixed up for us. Then circling around all we would have the Republican council dancing like diabolical demons, trying to put out a huge bonfire made from the wreck and ruin of a light plant the city once owned, with imaginary water from a water plant for which the city paid more than a million real dollars. If all this could be placed in the public park, where good pious people could go when the weather was nice and warm, and sit on the benches, amidst the perfume of sweet flowers, with a picture

> of Gratton H. Wheeler in one hand and Walter J. Thompson in the other; Oh, what a flood of tender memories would float over the soul! Oh what a history, pages without printing, volumes without words! But Tacoma will never down. She will fight for justice till the last dishonest damn rascal that drags his slimy carcass across the road to justice shall have been fed to the crows. Men who have forgotten more law than * * * and his steed of supercilious asses ever knew have studied this warrant question for months and years; and they say warrants have been paid; that they are dead, and should not be paid again. This is only a touch of the tail end of Republican prosperity of the past; but let us go on to the future. The day fast comes when the stains of disgrace and dishonor, those perfidious and pusillanimous tools of the trusts have placed upon the fair name and fame of Washington, will be wiped out forever. We must fight the ground inch by inch until honest men, who see no Klondike in the bench, shall be elected,—men who have the people's interests at heart, as well as the interest of the bondholder and warrant shark. This state will rise in its wrath, and, when fall comes, vicious, vacillating * * * will be swept into oblivion forever.

If a newspaper publishes a criticism of a judge in particular reference to his rulings in the trial of a case already tried and finally determined, there would not be ordinarily constructive contempt of court, for the case would be no longer pending; [83] the criticism would have no effect upon changing or prejudicing the rights of the parties to the litigation. An editorial commenting upon proceedings which required a state commissioner to testify before the grand jury was held not contempt, for the case was closed.[84]

It has been held however that a criticism published charging a judge with unfairness would be contempt, for it would bring the official action of the court into contempt and ridicule.[85] It has been held, on the other hand, that no matter how defamatory a criticism might be concerning a judge, there would be no contempt unless a case then pending might be affected.[86]

When the judge is scandalized he has the right to sue for libel, but when the defamatory material is such that it might affect adversely the reputation of the court so that in the public mind the court would be thought either dishonest or inefficient and so in-

[83] State v. Anderson, 40 Iowa 207 (1875).

[84] State v. Sefrit, 84 Wash. 345, 146 P. 864 (1915).

[85] In re Chadwick, 109 Mich. 588, 67 N.W. 1071 (1896).

[86] Ex parte Green, 46 Tex.Cr. 576, 81 S.W. 723, 66 L.R.A. 727, 108 Am. St.Rep. 1035 (1904).

capable of fair judicial administration, it has been held that the court can cite for criminal contempt.[87] Libels published on the judge as a man rather than on the judge as an officer in the tribunal are not strictly contempts of court, unless the effect is such that the effective operation of judicial administration would be lessened thereby. It has been held that a story published during a murder trial stating that a judge was an abettor of murder was but a libel on the judge and did not interfere with the administration of justice;[88] it is submitted however that this case is not sound, for surely such a story concerning a trial could easily so scandalize the court that no fair trial could result.

The case of Storey v. People[89] illustrates the principle that contempt will be used as a punishment for libel only when the libel is committed during the progress of a trial so that there will be a tendency thereby to obstruct the administration of justice. Storey had published in the *Chicago Times*[90] articles seemingly bringing the grand jury into disrepute, throwing suspicion upon that body, and questioning the character of some of the jurymen. Storey had been indicted for libel and for publishing an obscene newspaper; his criticisms followed the indictment and he was cited for contempt but the supreme court reversed the decision of the lower court and stated:

> In our opinion, it is not admissible under our constitution that a publication, however libelous, not directly calculated to hinder, obstruct, or delay courts in the exercise of their proper functions shall be treated and punished, summarily, as a contempt of court.[91]

The *San Francisco Weekly Star* published the following:

> **A Criminal Judge**
>
> We charge F. W. L———, judge of the superior court of San Francisco, with deliberate lying about the law, deliberate, intentional falsification in his official capacity, and deliberate, intentional denial of justice. He is not merely a fool, but an impudent rascal; a criminal on the bench. He ought to be impeached and removed from office, and disfranchised, indicted, and punished by fine and imprisonment;

[87] State v. Hildreth, 82 Vt. 382, 74 A. 71, 24 L.R.A.,N.S., 551, 137 Am.St. Rep. 1022 (1909).

[88] Ex parte Hickey, 4 Smedes & M. 751, 12 Miss. 751 (1841).

[89] 79 Ill. 45, 22 Am.Rep. 158 (1875).

[90] The Chicago Times cited in that case was the old Chicago Times, not the present Daily Times, a tabloid newspaper in Chicago.

[91] 79 Ill. 45, 50, 22 Am.Rep. 158.

made a convict of. But our criminal machinery and our legislature are so often elected and used, (just as L——— acts), not to punish wrong-doing, but on purpose to protect it, that such a proceeding is hopeless. If the information which we have received is wrong, let the editors of the Weekly Star be at once arrested on a charge of criminal libel. We invite and defy L——— to venture to defend himself, even in a San Francisco court by this proceeding. We shall make the crime of this judge so plain, that even the wayfaring men, though fools, shall not err therein.

The case is this: A suit has been brought against Supervisor Henry Bingham to determine whether he is entitled to the office of supervisor. This suit was assigned by the Buckley judge, Levy, to the other Buckley judge, L——— (upon which every lawyer in town knew beforehand what L——— would do, though they could not have foreseen just how he would begin to do it). When the case came up before L——— yesterday, Bingham's attorney "demurred"—that is, he said the superior court had (no) authority to try a case like this. In reply, the complainant's attorney showed that the constitution expressly provides that the superior court has jurisdiction over all such cases. And this impudent falsifier of the law and denier of justice, F. W. L———, allowed the demurrer, absolutely giving for a reason that, "although the constitution does give the superior court jurisdiction over all such cases, yet this is not all cases, but only one case and therefore this court has no jurisdiction over it."

This seems impossible. But we affirm it to be true, and upon the affirmation, we are deliberately taking the risk of being publicly dishonored unless Judge L——— remains publicly dishonored. It is exactly as if the burglar Jimmy Hope had been discharged by Judge Toohy without trial on the ground that the "law only provided for the trying of all burglars, and therefore did not provide for trying this one."

It was held that this publication was in contempt of court. In giving its decision, the California Supreme Court stated:

Liberty of the press to fairly criticize the official conduct of a judge or the decisions or proceedings of the courts, and to expose and bring to light any wrongful, corrupt, or improper act of a judicial officer, is one that should be carefully preserved and protected by the courts. If a public supervision and censure, through the press or otherwise, is necessary to suppress corruption and keep the channels of justice pure and untainted, the right to exercise such supervision, and to censure and expose wrong-doing, should be and must be upheld by the courts. But the publisher of a newspaper who assumes to criticise or censure a public officer or the proceedings of a court must know whereof he speaks. If he censures unjustly or charges falsely, he must be held strictly ac-

countable. While his right of free speech is protected, his abuse of it must be punished. [92]

§ 75. LOS ANGELES TIMES CITED

Press freedom threatened by contempt proceedings for seven editorials published within six months.

Contempt precedents endangering freedom of the press are nowhere more clearly marked than in the Los Angeles County Superior Court case, In the Matter of the Times-Mirror Company et al., in August, 1938. The Times-Mirror Co., publishers of the *Los Angeles Times,* was cited for contempt on seven counts based on affidavits brought by the Los Angeles Bar Association. The charges arose on the basis of seven editorials containing comment on cases which at the time of publication had not been finally adjudicated.

The first editorial, "Sit-Strikers Convicted," published in the *Times* on December 21, 1937, praised the conviction of twenty-two sit-down strikers and warned the defendants that they and their associates were not wanted in Los Angeles. The editorial follows:

SIT-STRIKERS CONVICTED

The verdict of a jury finding guilty the twenty-two sit-strikers who led the assault on the Douglas plant last February, will have reverberations up and down the Pacific Coast and in points farther east.

The verdict means that Los Angeles is still Los Angeles, that the city is aroused to the danger of davebeckism, and that no kind of union terrorism will be permitted here.

The verdict may have a good deal to do with sending Dave Beck back to Seattle. For while the United Automobile Workers have no connection with Beck, their tactics and his are identical in motive; and if Beck can be convinced that this kind of warfare is not permitted in this area he will necessarily abandon his dreams of conquest.

Already the united farmers and ranchers have given Beck a severe setback. The Hynes hay market is still free and it has been made plain that interference with milk deliveries to Los Angeles will not be tolerated.

Dist.-Atty. Fitts pledged his best efforts to prevent and punish union terrorism and racketeering in a strong radio address, and followed it up yesterday with a statement con-

[92] Ex parte Barry, 85 Cal. 603, 608, 25 P. 256, 20 Am.St.Rep. 248 (1890).

gratulating the jury that convicted the sit-downers and the community on one of the "most far-reaching verdicts in the history of this country."

In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime.

The seizure of property by a militant minority, which arrogated to itself the right of dictating not only to employers, but to other workers not in sympathy with it, what should be the terms and conditions of working, has proved to be within the control of local peace officers and authorities.

Nobody ran off to Washington to get this affair handled. It was attended to right here.

Government may have broken down in other localities; whole States may have yielded to anarchy. But Los Angeles county stands firm; it has officers who can do their duty and courts and juries which can function.

So long as that is the case, davebeckism cannot and will not get control here; nor johnlewisism either.

The editorial appeared however before sentence had been passed or a ruling made on a motion for a new trial, an application for a writ of prohibition, or a determination whether the crime committed by the strikers would be classed as a misdemeanor or a felony.

The second editorial, "The Wright Verdict," appeared in the *Times* February 13, 1938, following the conviction of Paul A. Wright on a manslaughter charge but before his trial on a second plea of insanity. This editorial did not criticize adversely the court, the jury, or the verdict, but did excoriate the "weird California law" which permitted contradictory pleas of "not guilty" and "not guilty by reason of insanity."

"The Fall of an Ex-Queen," the third editorial on which contempt was charged, was published by the Times April 14, 1938, following the conviction of Erwin P. Werner and Helen M. Werner for bribery, but prior to disposal of a pending motion for a new trial. The editorial follows:

THE FALL OF AN EX-QUEEN

Politics as we know it is an essentially selfish business, conducted in the main for personal profit of one kind or another. When it is of the boss type, it is apt to be pretty sordid as well. Success in boss-ship, which is a denial of public rights, necessarily implies a kind of moral obliquity if not an actually illegal one.

So that it is something of a contradiction of sense if not of terms to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace. If they had been, she would not have been in politics at all and probably would never have been heard of in a public way. Her natural flair was purely political; she would have been miscast in any other sphere of activity.

Mrs. Werner's primary mistake seems to have been in failing to recognize that her political day was past. For years she enjoyed the unique distinction of being the country's only woman boss—and did she enjoy it! In her heyday she had a finger in every political pie and many were the plums she was able to extract therefrom for those who played ball with her. From small beginnings she utilized every opportunity to extend her influence and to put officeholders and promising political material under obligations to her. She became a power in the backstage councils of city and county affairs and from that place of strategic advantage reached out to pull the strings on State and legislative offices as well.

Those were the days when Mrs. Werner was "Queen Helen" and it is only fair to say that to her the power was much more important than the perquisites. When the inevitable turning of the political wheel brought new figures to the front and new bosses to the back, she found her grip slipping and it was hard to take. The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her onetime influence in high places. That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical. But if there is logic in it, the money meant less to Mrs. Werner than the name of still being a political power, one who could do things with public officials that others could not do. To herself at least she was still Queen Helen.

The court in its opinion declared that the discussion at such time of extraneous matters concerning Mrs. Werner's career was within the category of prohibited comment.

The fourth editorial, "Jackie's Millions," published April 16, 1938, discussed Jackie Coogan's effort to obtain an accounting of the funds he had earned as a child actor, funds which under the California law he could not legally claim. In this editorial there was no attempt to influence the court.

"Probation for Gorillas," an editorial published May 5, 1938, was as follows:

Probation for Gorillas?

Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in

> Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are "first offenders," or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.
>
> Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.
>
> It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their "duty" would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill.

Concerning the foregoing editorial, the court stated in its opinion:

> It is of no consequence that this editorial, as argued by counsel for respondents, merely expressed the attitude which the *Los Angeles Times* has maintained for more than fifty years toward those who committed violence during labor disputes. Even if such attitude had been well known in this community for the period mentioned that fact did not excuse the language addressed directly to the judge telling him in few but expressive words how he should deal with the convicted defendants.[93]

This editorial on labor disputes and violence appeared following the conviction of the defendants of an attempt to commit an assault with a deadly weapon and the assault itself but during the time when there was still pending an application for probation.

After publication of these editorials, the bar association filed an affidavit charging contempt, whereupon the *Times* published two further editorials, entitled respectively, "A Black Commit-

[93] Statement of the court as reported in Editor & Publisher, Aug. 27, 1938, p. 6.

tee Here," on June 5, 1938, and "Curious Reasoning," on June 7, 1938. These editorials are herewith given in full:

A BLACK COMMITTEE HERE?

(Editorial)

In what appears to be an effort to set up a sort of local Black committee of press censorship, a committee of the Los Angeles Bar Association has complained to the courts that The Times is "in contempt" thereof because from time to time it comments editorially on matters of public interest and importance which are or have been the subjects of criminal and civil litigation.

The action is a sudden one and is, so far as The Times is aware, without precedent here or anywhere else. In its efforts to cause The Times to be punished for fulfilling, to the best of its ability, one of the recognized functions of well-conducted newspapers everywhere, this so-called contempt committee has searched the files of this journal for the past six months and has discovered five instances of such comment. In order that the public may be informed as to this extraordinary attack upon the right of free speech and a free press, these instances may be briefly described here.

On December 21, last, The Times published an editorial commenting on the Douglas plant. This editorial, printed after the men had been found guilty by a jury of felonious conspiracy, congratulated Los Angeles on the possession of prosecutors, courts and juries able and determined to maintain law and order and to prevent the incursion here of labor terrorism. Similar views were expressed at the same time by Dist.-Atty. Fitts in a radio address and in a public statement. So far, at least, the District Attorney has not been cited for contempt. Ten days later Judge Ambrose, who presided at the trial, imposed heavy fines on the strike ringleaders and lesser ones on the others convicted. If he felt that The Times had made an improper effort to "influence" him, he did not say so.

On February 13 of this year The Times published an editorial commenting on and approving the verdict of a jury finding guilty of manslaughter Paul Wright, slayer of his wife and his friend. The editorial criticised the California law under which Wright was permitted to enter a simultaneous plea of not guilty and not guilty by reason of insanity. By way of justifying this criticism, it may be noted that Wright was subsequently declared, by the same jury, to have been insane at the time of the killings and therefore guiltless. A few days later he was declared presently sane by a committee of alienists and went scot free. The Times commented freely and vigorously upon these developments after their occurrence. There was no complaint on the part of the courts of "interference" with the processes of justice.

On April 14 of this year The Times commented editorially on the conviction of Mrs. Helen Werner, who, with her husband was found guilty by a jury of having solicited a bribe and of attempted grand theft. This editorial expressed the opinion that Mrs. Werner's political proclivities were indirectly responsible for her downfall, as having established for her a reputation for influence which she was anxious to recover and maintain. No objection to this comment, which was, of course, subsequent to the verdict, was expressed by Judge Ambrose, presiding in the case, then or later.

On April 16 The Times published an editorial commenting on the controversy between Jackie Coogan and his mother and stepfather over Jackie's earnings as a child film actor. This editorial explained the origin and nature of the California law under which parents have the sole right to the earnings of their minor children and expressed the opinion that children, particularly children in motion pictures, should ultimately receive at least part of such earnings. No objection to this has been voiced by either side in the Coogan litigation or by the courts. Enactment of a law somewhat along the lines of The Times' suggestion has since been advocated by a judge on the local bench.

On May 5, last, The Times printed an editorial opposing probation for two "goon-squad" members of the Teamsters' Union who had been convicted of felonious assault upon nonunion truck drivers. It said in substance that, in the interests of society and of community safety, men who commit such acts of terrorism, particularly when for pay, should be severely punished. It may be noted in connection with this case that it is and long has been an established practice in probation matters for those in charge of them to invite informed opinion on the question of whether or not probation should be granted.

These five editorials form the basis of the charge that The Times has attempted to influence the orderly and evenhanded operations of the courts.

Neither the incident itself nor those who have precipitated it are of great importance. But the principle involved is of the very highest significance, not merely to newspapers, whose right of free and fair comment is guaranteed by the Constitution, but much more to the public for whose service and protection that right is exercised.

For the information of the contempt committee—there are few others who need it—it may be pointed out that it is part of the business of newspapers not only to print the news but fairly to interpret it by means of editorial comment. In the nature of things, newspapers have facilities for the collection and interpretation of news which are possessed by no other public agency. With few exceptions, these facilities are honestly and faithfully employed for the information of the public and to aid in shaping intelligent public opinion on matters wherein such intelligent opinion is vital to the public's own

interest. Misuse of these functions for selfish purposes is self-punishing, involving as it does quick loss of that popular confidence which is a newspaper's greatest asset.

To charge or imply that The Times has attempted, for some purpose of its own, to influence the courts in these or any others of the thousands of similar cases it has reported and commented on in the fifty-seven years of its publication is too silly to dignify by denial. The Times has always taken pride in the high average of intelligence, ability and integrity of the local judiciary and has lost no opportunity to support and upbuild it. Such contributions The Times considers a sufficient refutation of these ill-considered charges, since they are mutually contradictory and incompatible.

Though the charges bear the official sanction of the Bar Association, The Times does not believe that they are brought with either the knowledge or the approval of the large body of informed and intelligent attorneys in that organization—neither these nor the other efforts which lately have proceeded from like sources to limit the adequate reporting of court news by all the Los Angeles newspapers.

In the Bar Association are many men as well aware as any newspaper publisher of the danger to the public interest of attempts to circumscribe the legitimate liberties of the press. They have observed the evils which have flowed from that policy in Russia, in Italy and in Germany. They are aware that the first step toward a dictatorship is invariably an effort to throttle the press, to the ends that the people may be kept in ignorance of vital public matters and that governmental abuses may be rendered exempt from criticism. They are aware of the efforts which have been made in this direction by Senator Minton and the notorious Black committee. They will, The Times believes, share its own regret that such an action as this should have been brought in the name of their organization.

CURIOUS REASONING

The extraordinary "contempt of court" action brought in the name of the Los Angeles Bar Association against The Times is an attempt to reduce to such narrow limits the right and duty of newspapers to analyze public questions as practically to destroy their usefulness in that respect.

The theory which the Bar Association's five-man Contempt Committee appears hastily to have embraced is that no case which is before the courts may be so analyzed or commented upon until the courts have said their last word upon it. For example, four of the five Times editorials cited by the committee are classified by it as being "in contempt of court" because, while they were published after jury verdicts had been returned, the publication occurred before the judges' disposi-

tion of the cases, which were criminal ones, by sentence or otherwise. The idea seems to be that such comment is calculated to sway the judge one way or the other so that, as a result, the disposition of the case might thereby be made different from that dictated by its own intrinsic merits.

This notion is itself scarcely complimentary to the courts which are supposed to, and usually do, function on the basis of their own best judgment and knowledge of the law, independent of any extraneous influence. It further fails to take into account the fact that, with few exceptions, the penalties for all classes and degrees of crime are fixed by law within such limits as to allow judges comparatively small latitude in which such extraneous influence, were it actually effective, could operate.

In the fifth editorial complained of by the Bar Association's committee, The Times, in common with some hundreds of other newspapers over the country, expressed its views on the question raised by the litigation over Jackie Coogan's earnings. In the apparent view of the committee, it was "contempt" to say that, in this paper's opinion, children ought to have some rights to and share in the products of their own labor. The expression of this opinion, the committee seems to think, should be punished as a willful effort to influence the court—notwithstanding that the law in the case is perfectly clear and that it presumably will be decided according to what the law says and not according to anyone's opinion as to what it ought to say.

However, the biggest of the several obvious holes in the committee's contentions is the fact that no legal case is ever finally disposed of until it has been passed upon by the highest court of jurisdiction to which it is permitted to be taken. The process of appeal upon appeal often occupies years; the Tom Mooney case, for example, is not legally settled yet, since the United States Supreme Court has not yet ruled upon it. This case is more than twenty years old, Mooney has grown gray in prison, thousands upon thousands of newspaper editorials, books, pamphlets and argumentative articles have been published for and against his cause. And, according to the logical projection of the Bar Association committee's curious reasoning, every one of them is in contempt of court!

Nearly every great public question is at some time or other the subject of litigation. Are we to be prohibited from discussing and analyzing such questions until after the Supreme Court has ruled thereon? Millions of words for and against the National Recovery and Agricultural Adjustment acts—the most important statutes in a generation—were published between the time of the first court attacks on them in 1933 and the time the Supreme Court finally invalidated them some two years later. In that interval they were in the status of unadjudicated legal cases and, therefore, in the conception of this committee, published argument regarding them must have

been in contempt of court and should have been prevented or punished!

Realization of the committee's apparent ambition to choke off public discussion of questions which are before the courts would not merely affect newspapers. It would bar such discussion over the radio by everyone from the President down and would eliminate from radio programs some of their most constructive material. Magazine contents would be reduced chiefly to love stories, trade and other publications would be emasculated, political speakers and writers would mostly be in jail.

Free discussion of public questions is one of our greatest safeguards; efforts to suppress it one of our gravest perils. Wise decisions are hammered out on the anvils of debate. Facts are essential, but only thoughtful study and analysis make them useful. The editorial columns of newspapers are natural leaders of public discussion. Though the views they express may at times be biased or erroneous, they are still the stimuli of thought and argument through which just public judgments are finally arrived at. Their privileges can be and sometimes are abused, but the principle for which they stand is not one lightly to be tampered with.

Demurrers to the contempt charges were overruled as to the contemptuous nature of all the editorials except the second, "The Wright Verdict," and the fourth, "Jackie's Millions." The *Times* was forthwith adjudged guilty on the basis of out-of-court contempt, thus setting up a far-reaching if not astounding doctrine as to the extent of the power of the courts to prevent discussion of pending cases.

The case was appealed to the California Supreme Court which overruled the convictions for the publication of the two editorials, "A Black Committee Here" and "Curious Reasoning."[94] Convictions were affirmed for the publication of the three editorials, "Sit-Strikers Convicted," "The Fall of an Ex-Queen," and "Probation for Gorillas."

The case then came before the Supreme Court of the United States on a writ of certiorari to the Supreme Court of California. In a divided decision, the United States Supreme Court reversed the decision of the California Supreme Court, holding that "we are all of the opinion that, upon any fair construction, their possible influence on the course of justice can be dismissed as negligible, and that the Constitution compels us to set

[94] Times-Mirror Co. v. Superior Court in and for Los Angeles County, 15 Cal.2d 99, 98 P.2d 1029 (1940).

aside the convictions as unpermissible exercises of the state's power." [95]

The decision in the *Los Angeles Times* case is unsatisfactory. The court divided 5 to 4 in its opinion, with Justice Frankfurter writing a blistering dissent. While the press generally took the view that the reversal of the convictions was a victory for a free press, the decision is not clear-cut, and leaves generally the question of trial by newspaper unanswered. The majority opinion would seem to permit severe criticism and threatened suggestion to a judge prior to his announcement of decision, and especially on the ground that in this specific case the stand of the *Los Angeles Times* on labor was well known and that any comment from that source would be accordingly discounted. However, the *Los Angeles Times* was a powerful newspaper of wide circulation at the time of the publication of this comment; it represented a definite viewpoint. While Judge Scott may not have been intimidated a bit, there is the question whether such editorials published about pending cases in cities throughout the state would not influence the courts. Whether they would be influenced or not is not the real question. The real question would seem to be whether a court has the inherent power to punish for a constructive contempt in a pending case. The majority decided that in the specific *Los Angeles Times* case there had been no serious tendency for the court to be influenced in its decision, and that there should be no moratoria on discussion of questions having a public interest merely because pending litigation *might* be influenced.

When there is a conflict of rights, the adjustment of the resultant situation lies not only in the application of general principles but also of common sense.

Traditionally a court has an inherent power to punish for direct contempt, and although the authority in precedent may be hazy and inaccurate, there is sufficient authority in both English and American jurisprudence to justify punishment for constructive contempt.

On the one side, we have the necessity for discussion; on the other we have the integrity of the courts. When as Justice Holmes has said, there is a clear and present danger there is time for the courts to assume their inherent power except as

[95] Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 200, 86 L.Ed. 192 (1941).

limited by statute in their own jurisdiction. The *Los Angeles Times* case indicates a bold attempt on the part of the Los Angeles Bar Association to stifle that newspaper; its proceedings lent a very bad effect to the litigation and moreover aroused the press to the injustice of so many citations. Naturally, the press rejoiced when the United States Supreme Court reversed the convictions for publishing the three editorials. But, it is submitted that the editorial, "Probation for Gorillas" was in conflict with the historic powers of American courts; such editorial admonition to presiding judges in undecided cases, if generally permitted, would be no less than effectively dangerous to judicial integrity.

§ 76. DEFENSE FOR CONTEMPT

Though decisions are not in agreement, the general rules are that neither truth nor absence of intent necessarily absolve contempt charge.

Defense to a citation for constructive contempt may be a challenge to the constitutionality of the charge, a denial of the facts, absence of intent, and the truth of the charge published. The decisions are not always in agreement on principle of law, and specific facts of course may alter the application of general principles. It has been held that any publication to constitute contempt must have been an intended disrespect for the authority of the court; [96] however, there is a line of cases which holds that if the intent is uncertain and any intended disrespect of the court is disavowed under oath, there would thereby be a purge of the contempt. In State ex rel. Haskell v. Faulds,[97] the respondent was discharged on the ground that no contempt of the court was intended in the publication of the following story:

> The Supreme Court of Montana, the highest tribunal of justice in the state, was the first to throw down the bars and deal out injustice to the people of Ravalli county. The dirty deal is made the more obnoxious through the action of Governor Rickards in his reasons for granting the pardon.

Truth of the allegedly contemptuous article is not necessarily a defense; the question depends in part upon the cause of the contempt. If the contempt is such that it tends to interfere with the administration of justice but does not scandalize the judge

[96] Fishback v. State, 131 Ind. 304, 30 N.E. 1088 (1891).

[97] 17 Mont. 140, 42 P. 285 (1895).

or the court, truth would not be a defense so long as the case mentioned in the publication was pending; on the other hand, if the charge is one which would normally interfere with the administration of justice except that no case concerned is pending, the question of the truth of the charge would not be of importance. When the alleged contempt is a scandal on the court, however, so great in effect, that immediately future witnesses, members of the bar, litigants, and the public generally would lose confidence in the integrity and efficiency of the judiciary, it would seem, particularly if no pending case were involved, that truth or truth published with good motives for justifiable ends would be an adequate defense upon appeal.

In Dale v. State,[98] it was held that neither the truth nor absence of intent was an adequate defense. State v. Hildreth [99] is authority for the principle that at common law a publication which scandalizes a court is a contempt even though the case or circumstances mentioned in the story are not then pending in the particular court.

In People v. Stapleton,[100] it was stated that the publisher of a newspaper could not exonerate himself by denying that he had any previous knowledge of the article in question; this fact might be shown in mitigation but not in justification of the contempt.

§ 77. BUGABOO OR SUBSTANTIVE THREAT?

Reconciliation necessary to preserve integrity of courts and the right of the press to report and comment on legal controversies.

Out of the conflict between independence of the courts and freedom of the press is it possible to postulate some reconciliation? While it has been said that fears so often expressed by the courts have been absurdly magnified and that one in a judicial position may be expected to possess mental balance and emotional control sufficient to withstand undue pressure, hypothetical cases may be easily presumed in which publications during a trial might easily intimidate a court, and especially certain

[98] 198 Ind. 110, 150 N.E. 781, 49 A.L.R. 647 (1926); 273 U.S. 776, 47 S.Ct. 332, 71 L.Ed. 886 (1927); 274 U.S. 763, 47 S.Ct. 454, 71 L.Ed. 1322 (1927).

[99] 82 Vt. 382, 74 A. 71, 24 L.R.A.,N.S., 551, 137 Am.St.Rep. 1022 (1909).

[100] 18 Colo. 568, 33 P. 167, 23 L.R.A. 787 (1893); Ex parte Nelson, 251 Mo. 63, 157 S.W. 794 (1913).

types of members of a jury; in such extreme cases, when public opinion is at high tension, an out-of-court contempt might easily be effected and some justification for summary punishment tolerated without placing the tenets of freedom of the press in jeopardy.

Judges are human and in their process of keeping in touch with the world of affairs they certainly have the right to read books, magazines, and current newspapers. Judges should know the background of economic and social changes and in so keeping in touch with categorical phases of life about them, they are bound to be impressed, their own knowledge increased or modified, and their spiritual understanding deepened. This newer depth of understanding may give new operative attitudes and firmer convictions; previous concepts may be discarded. The judge is thus subject to kindred informational and psychological influences; it is not required that a judge to be fair in his decisions should withdraw from life to become a juridical recluse. The judge should have the same right to grow mentally that is enjoyed by the average intelligent citizen.

How is the judge impressed? Is he not influenced by modern trends and new researches and discoveries as other professional men may be influenced? Naturally, his mental judgments must be sound, his legal knowledge thorough, and his viewpoint both ethical and equitable. In this modern age of many public lectures, searching newspapers and magazines, and radio broadcasts, the judge as well as any other citizen may be influenced, but such influence does not necessarily mean that in a particular case before the court he will sidestep his oath of office and professional obligation to be unfair to the merits of the question before him.

In People v. Stapleton,[101] the court commented upon the character of judges as follows:

> Judges are human; they are possessed of human feelings; and when accusations are publicly made, as by a newspaper article, charging them directly or indirectly with dishonorable conduct in a case pending before them and about to be determined, it is idle to say that they need not be embarrassed in their consideration and determination of such cause; they will inevitably suffer more or less embarrassment in the discharge of their duties, according to the nature of the charges and the source from which such charges emanate.

[101] 18 Colo. 568, 580, 33 P. 167, 23 L.R.A. 787 (1893).

> When a judge tries and determines a cause in connection with which public charges against his judicial integrity have been published, the public as well as parties interested are frequently led by the publication of the charges to distrust the honesty and impartiality of the decision; and thus confidence is impaired. It is not only important that the trial of causes be impartial and that the decisions of courts be just, but it is important that causes shall be tried and judgments rendered without bias, prejudice, or improper influence of any kind. It is not merely a private wrong against the rights of litigants and against the judges—it is a public wrong—a crime against the state—to undertake by libel and slander to impair confidence in the administration of justice. That a party does not succeed in such undertaking lessens his offense only in degree.

Justice Holmes in a dissenting opinion in Toledo Newspaper Co. v. U. S.,[102] stated:

> The statute in force at the time of the alleged contempts confined the power of courts in cases of this sort to where there had been "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice."

He pointed out further that misbehavior means something more than adverse comment or disrespect and that a judge of the United States "is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty."

Two significant attributes of a democratic government, integrity of the courts and freedom of the press, impinge. The conflict has stirred proponents of that legal sanctity, legislative authority, as well as the defenders of a press who want to be free and willing to discuss vital questions of public interest, whether arising from trial contests or governmental action. The legislative function may set the law and proscribe the limits of new judicial and administrative bodies; the judicial function, particularly as defined by the constitutions of the several states and the Federal Constitution, may question the legality of any parliamentary enactment against the rights formulated and defined in constitutional convention or by amendment by vote of the electorate.

How far may the legislature go in limiting the power of the courts to protect their own integrity or to administer efficiently

[102] 247 U.S. 402, 422–424, 38 S.Ct. 560, 62 L.Ed. 1186 (1918).

their own particular business? Legislative action has tried to limit the courts, but the courts in some jurisdictions have interpreted their prerogatives and powers even in conflict with or supplementary to legislation.

The courts clearly have an inherent right to protect their own interests so far as actual trial procedure is concerned. Whether their rights to control opinion on questions pending in the courts or to stop trial by newspaper are inherent, may seem academic. When the press flagrantly defies the courts and might seem to obstruct a fair determination of causes, it is submitted, the courts should have the power to cite for constructive contempt. Both the press and the public want court integrity, impartiality, and administrative efficiency. Where the line may be drawn is hard to determine, for general principles do not decide specific cases.[103]

There is no juridical logic or common sense justice in permitting one charged with crime to be inferentially tried in the columns of the newspaper prior to his trial in the courtroom. On the other hand, there is no constitutional authority in this country for a secret trial, except under the demands of war restrictions or possibly on trials involving obscene details; even in such exceptions the results are generally later made public.

Crime news is legitimate news, whether it concerns the crime itself, the search for and the apprehension of the criminal, or the trial of the alleged criminal. News about crime and the administration of justice should be made public. Common sense dictates however that no newspaper release should be so prejudicial as to obstruct the efficiency of court administration.

Confusion of the application of principles results in part from the reluctance of the judiciary generally to cite for constructive contempt. Throughout the country judges are elected; they are dependent upon public support and fair recognition by the press. Some judges hesitate to cite for constructive contempt, if for no other reason than the apprehension of losing popular support of the newspapers in their community. Admittedly, there is a natural inclination for an elective judge to give every possible "break" to the press; yet, most judges feel their professional obligations and are accordingly unwilling to breach legal ethics and judicial decorum.

[103] Justice Holmes' dissenting opinion in Lochner v. N. Y., 198 U.S. 45, 76, 25 S.Ct. 539, 49 L.Ed. 937, 3 Ann. Cas. 1133 (1905).

Judges cannot shut themselves off in a cloistered universe; they should be persons who appreciate the problems and influences of the world; they should be able to evaluate criticism.

There would not seem great necessity for marked legislative reform in regard to constructive contempt. If the judiciary takes a common sense view, so aptly advocated by Justice Holmes, then only those threats to justice which are clear and present dangers should be held contemptuous.

It is within the power of the judiciary itself to exercise discretionary control in dealing with constructive contempt problems so that there would need be little negative criticism. The judiciary can make rules for its own practice and so could easily have another judge hear the charge of out-of-court contempt presented and the answers of the person required to show cause why he should not be cited for contempt or be summarily punished.

CHAPTER 14

COPYRIGHT AS A PRESS CONTROL

Sec.
78. Copyright as a Press Control.
79. Statutory Copyright.
80. Infringement.

§ 78. COPYRIGHT AS A PRESS CONTROL

As literary property, copyright is a right or claim which, if based on common law, is lost upon publication. Federal copyright protects the manuscript after publication.

The law of copyright as a press control is a limited field, affecting newspapers and periodicals. A newspaper article, news story, editorial, feature article, cartoon, photograph, or an advertisement may be the subject of copyright. Either the individual article or the entire newspaper or periodical may be copyrighted. Naturally, the question arises as to what protection copyright gives.

Copyright applies to the literary style of the article or the news story; it does not apply to the theme or idea of the article. Anyone may write on any subject, although a published book or story on the same subject enjoys copyright protection. It is not the idea or the topic that is protected by copyright, rather it is the manner of particular expression that is copyrightable. It is the order and selection of words, the peculiar form of rhetorical expression as given by selection of words, phrases, clauses, sentences, and arrangement of paragraphs.

Copyright is a definite control of the press; despite the guaranty of freedom of the press, newspapers, as well as individuals and institutions, are limited in their freedom to print material that is protected either by common law copyright or under provisions of the Federal copyright law.

The principle of copyright was known in early times, especially in the fifteenth and sixteenth centuries. Accounts show that the Republic of Venice granted to John of Speyer in 1469 the exclusive right to print the letters of Pliny and Cicero for a period of five years.[1]

[1] DeWolf, R. C., Outline of Copyright Law, p. 2.

The development of printing increased the need for some form of copyright. Although printing from movable types began in 1451 and Caxton introduced printing into England in about 1476, the first copyright law was not passed in England until the Statute of 8 Anne in 1709. Prior to the passage of this copyright law early in the eighteenth century, the business of printing brought two distinct effects. The first effect was the opportunity the invention offered to royalty and government to reward favored individuals, and the second effect was the recognition by those in power that the medium of printing, unless strictly controlled, tended to endanger their rule.

Laws were formulated to control the press, including a charter given in 1556 to the Stationers' Company.

The leading case on copyright in England is that of Donaldson v. Beckett,[2] decided in 1774. This case, overruling an earlier decision, held that there was no perpetual copyright existing after publication; this principle of copyright law is followed in the United States.

The first copyright law in the United States was enacted by the State of Connecticut in 1783.[3] A few years later when the Constitution was adopted in 1788, basic provision was made for copyright protection, in Art. 1, Sec. VIII, as follows:

> To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

The foregoing constitutional provision, with later legislation to provide for the details of copyright protection, establishes in the Federal government the statutory authority to administer copyright. Inasmuch as there is no common law for the United States Government, questions regarding common law copyright remain for adjudication in the several states, except under such provision that is made for taking a case to the Federal court.

The outstanding case of Wheaton v. Peters [4] decided that the Federal courts have no common law jurisdiction [5] and that an author retains his common law copyright so long as his work remains unpublished. The court stated:

> That an author at common law has a property in his manuscript, and may obtain redress against any one who endeavors

[2] 4 Burr. 2408 (1774).

[3] St. of Conn. (Ed. 1786) 133.

[4] 8 Pet. 591, 8 L.Ed. 1055 (1834).

[5] Willoughby, W. W., Constitutional Law of the United States, p. 446.

> to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.[6]

Copyright is an exclusive, legally recognizable claim to literary property. It is a right extended by either the common law or statute to entitle the originator of a literary writing to retain ownership of the product of his mind. So long as this product remains unpublished voluntarily on the part of the author, the common law gives protection; such protection is termed common law copyright.

Leading authorities have defined copyright in similar terms. According to Drone,[7] "Copyright is the exclusive right of the owner to multiply and to dispose of copies of an intellectual production." Bowker[8] defines copyright as "the right to multiply copies of those products of the human brain known as literature and art." Copinger's[9] definition is "Copyright may be defined as the sole and exclusive liberty of multiplying copies of an original work of composition."

Amdur defines statutory copyright as follows:

> The exclusive right, conferred by statute, to publish, multiply and sell copies of a work, to make transformations and modifications thereof, and to perform and otherwise represent it in public, after it has been published; except that these "exclusive" rights do not prevent others from enjoying equivalent rights in works originated by them although closely identical, and except that these rights do not prohibit "fair use" to be made of the copyrighted work.[10]

Copyright is both a right and a restriction. The newspaper may copyright its original material or the very form of the newspaper itself, but it cannot use without permission copyrighted works of others. Likewise, the newspaper cannot use literary material of others if and when such material is protected by common law copyright.

Copyright is a declaration of a positive right to the owner thereof but it is negative in character so far as use by others is concerned. The owner of a copyright is originally the author,

[6] 8 Pet. 591, 657, 8 L.Ed. 1055 (1834).

[7] Drone, E. S., Law of Property in Intellectual Productions, p. 100–101.

[8] Bowker, R. R., Copyright: Its History and Its Law, p. 1.

[9] Copinger, W. A., Law of Copyright (6th ed.), p. 1.

[10] Amdur, L. H., Copyright Law and Practice, p. 5.

although a corporation may hire a staff to compile a work and so may copyright the work directly, or an author may assign his copyright to another person, individual, or corporation.

The author may copyright his work but there is no obligation upon him to distribute the work widely. The copyrighted newspaper or periodical may be widely sold however, but such sale does not violate copyright.

As one form of literary property, copyright belongs to that class of personalty which embraces patents, trade-marks, trade names, trade secrets, good will, unpublished lectures, musical compositions, and letters.

Copyright may be distinguished from a patent in that the copyright covers purely composition, style of expression or rhetoric while a patent is the right given to protect a novel idea which may be expressed physically in a machine, a design, or a process. Copyright may be distinguished from trade-mark in that the former protects a particular literary style while the latter protects the sign or brand under which a particular product is made or distributed.

Election to copyright a literary production under the statute and actual compliance with such statute abrogate common law copyright in the United States. Under the law as interpreted in this country, common law copyright and statutory copyright are not parallel rights. Common law copyright ends when statutory copyright begins. In the history of copyright, the question of ownership of a literary production at common law despite its consequent publication was thoroughly debated. Lord Mansfield in the celebrated case of Miller v. Taylor,[11] together with two other judges, held in a 3 to 1 decision that common law copyright should be owned in perpetuity by the author; however, in Donaldson v. Becket[12] decided five years later, it was held that the common law right to literary productions ended as to published works under the effect of the Statute of Anne.[13] Donaldson v. Becket then became the established authority as to copyright in England and was in fact basically the principle held in Wheaton v. Peters.[14] In England, however, common law copyright was superceded by the Copyright Act of 1911[15] and copyright in the British Commonwealth of Nations is purely statutory as to both unpublished and published works.

11 (1769) 4 Burr. 2303.

12 (1774) 4 Burr. 2408.

13 8 Anne c. 19 (1709).

14 8 Pet. 591, 657, 8 L.Ed. 1055 (1834).

15 1 & 2 Geo. 5, c. 46 (1911).

Philosophically, it might seem that an author should be as much entitled to his production and the profit therefrom for all time or until he voluntarily makes disposition of his rights, or such rights are inherited by his heirs, as the creator of other kinds of property. One who builds a house and who owns the same may hold that property legally throughout his life, or he may control its disposition. Yet one who invents a machine may enjoy his monopoly for only a limited period under the patent laws.

One who writes an article, the product of his mind, his planning and investigation, may own the composition so long as he lives, or disposes of the particular writing; this right exists under the common law theory of copyright. If he wishes to use the composition for his pecuniary profit through multiplication and sale of copies, he loses his property right in his manuscript, unless he applies and accepts protection under the Federal statutory copyright law. In this respect, the owner of an original manuscript who does not protect his work under the statutes, it would seem, differs from the man who whittles a ship model or builds a hunting lodge, either of which he can enjoy or rent for profit without losing his property right therein.

Fundamentally, the basis of first ownership of literary property is natural law. Scholars in jurisprudence have recognized that preoccupancy gives a property right, tantamount to control and disposition. This theory has long been established as relating to the discovery and occupancy of lands not otherwise claimed or possessed. Ownership by occupancy is recognized in the products of physical skill and brain. As stated by Drone,[16] "the creator is the first possessor of that which he creates." The laborer is entitled to the fruits of his labor, and so the writer or the author is entitled to that which he produces, particularly so long as what he writes or designs, in the case of an artist, is not being produced for another under a contract expressed or implied. The author's thoughts are his own and so long as these thoughts are not voluntarily given to the public, he possesses a right of common law copyright in his production; this common law right to preserve rights in a literary production is not abrogated by statutory copyright in the United States. The present Copyright Act provides:

[16] Drone, E. S., Law of Property in Intellectual Productions, p. 3.

> That nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.[17]

It is clear therefore that the Federal copyright law does not supercede common law copyright in an unpublished work. Compliance with the Copyright Act gives protection to the author when and if his work is published under its provisions.

Being personal property, common law copyright may be acquired in much the same manner as other personal property. It may be created by the author for himself[18] or it may be developed by an individual as an employee of another. The unpublished manuscript may be transferred absolutely to another, thereby transferring the right of common law copyright and the right to apply to statutory copyright. Should a manuscript be transferred by gift to another with the intention of passing absolute title, the transferee would obtain legal possession; if on the contrary, a manuscript be lent to another for inspection and criticism, such a temporary transfer would not give title to the manuscript.[19]

If an author authorizes the publication of his manuscript without complying with provisions for statutory copyright, he loses his common law protection.[20] On the other hand, if a manuscript is stolen from him and published, or if it is published without his authority, his common law right is not lost;[21] he would have a right of action for damages or might bring a suit in equity to prevent usurpation of his composition.

The publication of a literary product must be a general one to defeat the common law right. According to Werckmeister v. American Lithographic Co.,[22] a general publication "consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public."

[17] Sec. 2, Act of March 4, 1909, 17 U.S.C.A. § 2.

[18] Wheaton v. Peters, 8 Pet. 591, 8 L.Ed. 1055 (1834).

[19] Jewelers' Mercantile Agency, Ltd. v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872, 41 L.R.A. 846, 63 Am.St.Rep. 666 (1898).

[20] Ibid.

[21] Ibid.

[22] 134 F. 321, 326, 68 L.R.A. 591 (C.C.A.N.Y.1904).

It is established that limited publication will not defeat common law copyright; it was held in Ferris v. Frohman [23] that a public performance of a dramatic or musical composition is not an abandonment of the composition to the public. It is only the general publication of the manuscript with the consent of the author that will amount to an abandonment of the rights of the author and a transfer of these rights to the public domain.[24] In Nutt v. National Institute, Inc.,[25] for the Improvement of Memory, the court stated:

> The author of a literary composition, as a lecture, may profit from public delivery; but that does not constitute the kind of publication which deprives him of the protection of the copyright statute by later application. Even where the hearers are allowed to make copies of what was said for their personal use, they cannot later publish for profit that which they had not obtained the right to sell. Common law rights are not lost by a limited publication, as distinguished from the general publication, and the delivery of these lectures before audiences prior to copyrighting was limited publication.

Any unauthorized and unfair use of a copyrighted news story constitutes an infringement for which either or both an action at law for damages and a suit in equity to enjoin further publication may be instituted.

Although a news story as such may be the subject of copyright, or an entire newspaper may be copyrighted, the news element in a newspaper story is not subject to copyright. The news, as was stated in the historic case of International News Service v. Associated Press, [26] is *publici juris,* part of the history of the day.

When one newspaper discovers an event *publici juris,* such as the arrest of a kidnaper, its particular news presentation of the facts may be protected by the copyright; however, the first story may serve as a tip for other newspapers or press associations, which following the first edition of the copyrighting newspaper may obtain their own facts on the arrest of the kidnaper, and forthwith present their own stories of the event; in this case, the time element so far as the public is concerned might be negligible, inasmuch as the elapsed time between the

[23] 223 U.S. 424, 32 S.Ct. 263, 56 L. Ed. 492 (1912).

[24] McCarthy & Fischer, Inc. v. White et al., 259 F. 364 (D.C.N.Y. 1919).

[25] 31 F.2d 236, 238 (C.C.A.Conn. 1929).

[26] 248 U.S. 215, 39 S.Ct. 68, 63 L. Ed. 211, 2 A.L.R. 293 (1918).

appearance of the first edition of the copyrighting newspaper and the appearance of the third or fourth edition of another paper might be but a few hours. If other newspapers or press associations make their own investigations and obtain their own stories, they would not violate copyright.

There is a line of cases to the effect that a news story once published becomes public property, so far as common law principles are concerned.[27] Such a ruling is based on the theory that there can be no common law copyright after publication. It must be remembered, however, that there is a distinction between news as such and a published news story. The element of news is free or common property to all who may discover the news, or the facts of current interest. A news story may be printed in a particular style but not protected by statutory copyright; in such a case, the news story may be freely reprinted. In case the news story is protected by statutory copyright, the news story may not be reprinted without permission.

To copy the copyrighted news story exactly would be an infringement, as would be the substantial copying or paraphrasing of the copyrighted story, as was shown in the Chicago Record-Herald Co. v. Tribune Association.[28] For one newspaper continuously to "lift" or steal news stories from another newspaper, or news service of which it is neither a member nor a client would be unfair competition; redress and protection for such continuous violation lie in the general principles of equity rather than in relief through a copyright infringement suit for damages.

The *New York Tribune* copyrighted a special news story on Germany's reliance upon submarines. This story, printed in the *Tribune,* Feb. 3, 1917, was offered for simultaneous publication in the *Chicago Herald,* which the *Herald* declined to accept. Thereupon the *Chicago Daily News* purchased the Chicago rights to the story.

With full knowledge that the *Tribune's* story on the German submarine campaign was fully copyrighted, the *Herald* nevertheless ran a condensed version or rewrite of the same story on the morning of Feb. 3.

[27] Donaldson v. Beckett (1774) 4 Burr. 2408; Tribune Co. of Chicago v. Associated Press, 116 F. 126 (C.C. Ill.1900); New York Times Co. v. Sun Printing & Publishing Ass'n, 204 F. 586 (C.C.A.N.Y.1913).

[28] 275 F. 797 (C.C.A.Ill.1921).

A comparison of stories as reported in the official report of the case follows:

Chicago Herald

Germany Pins Hope of Fleet on 300 Fast Supersubmarines

New York, Feb. 3—3 a. m. (special).—The Tribune this morning in a copyrighted article of Louis Durant Edwards, a correspondent in Germany, says that Germany to make the final effort against Great Britain has plunged 300 or more submersibles into the North Sea. These, according to this writer, were mobilized from Kiel, Hamburg, Wilhelmshaven, and Bremerhaven, where for months picked crews were trained.

"They form the world's first diving battle fleet," he says, "a navy equally prepared to fight above or beneath the waves."

There are two types of these new boats now in commission, one of 2,400 tons and one of 5,000 tons displacement.

They dive beneath the water in a fraction of the time that it takes the older types to submerge. They mount powerful guns, are capable of great surface speeds, and are protected by a heavy armor of tough steel plate.

The motors develop 7,000 horsepower and drive the boats under the surface at 22 knots an hour. These smaller cruisers carry a crew of from 60 to 80 men.

The submersibles have a radius of action of 8,000 miles.

New York Tribune

By Louis Durant Edwards. Copyright, 1917, by The Tribune Association (New York Tribune).

Germany plays her trumps. Three hundred or more submersibles have plunged into the waters of the North Sea to make the final effort against Great Britain. They mobilized from Kiel, Hamburg, Wilhelmshaven, Bremerhaven, where, for months, picked crews have trained.

* * * * * *

They form the world's first diving battle fleet, a navy equally prepared to fight above or beneath the waves.

* * * * * *

There are two types of these new boats now in commission, one of 2,400 tons and one of 5,000 tons displacement.

* * * * * *

They dive beneath the water in a fraction of the time that it took the older types to submerge. They mount powerful guns, are capable of great surface speeds, and are protected by a heavy armor of tough steel plate.

* * * * * *

The motors develop 7,000 horsepower, and drive the boats over the surface at a speed of 22 knots an hour. These smaller cruisers carry a crew of from 60 to 80 men.

* * * * * *

They have a radius of action of 8,000 miles.

* * * * * *

The *Chicago Daily News* then declined to publish the story and refused to pay for the story for which it had contracted. Naturally, the *Daily News,* having contracted to purchase an exclusive story, had the right to refuse to accept the story which had already been published in the *Herald.* The Tribune Association, publishers of the *New York Tribune,* sued the Chicago Record-Herald Company. Judgment was for the Tribune Association in the United States District Court, and this judgment was affirmed in the United States Circuit Court of Appeals.

All papers of the Associated Press are entitled to all the news spontaneous in origin in any member city. Member Associated Press papers subscribe to this condition which is stated in Article VIII of the association's by-laws as follows:

> Sec. 3. Each member shall take the news stories of the corporation and publish the news regularly in whole or in part in the newspaper named in the certificate of membership. Each member shall also promptly furnish to the corporation, through its agents or employees, all the news of such member's district, the area of which shall be determined by the board of directors.
>
> Sec. 4. The news which a member shall furnish as herein required shall be all such news as is spontaneous in its origin, but shall not include any news that is not spontaneous in its origin, or which has originated through deliberate and individual enterprise on the part of such member or of the newspaper specified in such member's certificate of membership.[29]

If a newspaper wishes to copyright a special story, as for example, a local exposé of the sheriff's office, the police department, or medical advertising quacks, this story would not have to be given to other A.P. newspapers; this story originated as a result of individual initiative and enterprise. On the other hand, if this newspaper should copyright a spot news story concerning the shooting of a deputy sheriff by a gambler, a story which might have been induced by the feature news campaign story of the expose, other A.P. members could use the story despite the copyright, for by signing the A.P. by-laws the originating newspaper has given its consent in advance for all A.P. members to use news stories collected through its efforts when such news stories are of spontaneous origin.

[29] Charter and By-Laws of The Associated Press (26th ed., 1942).

Any other news association with similar arrangements in its by-laws would be in the same position as the A.P. in the illustration given.

If one newspaper copyrights a story resulting from individual, deliberate, and long-planned enterprise, and uses a sensational story on the basis of news happenings immediately connected therewith, other newspapers, members of the Associated Press, without doubt could use a modified form of the story. If another newspaper, not a member of the Associated Press, runs a rewrite on the copyrighted story, stating in its lead that the first newspaper in a copyrighted story stated certain news facts, and then followed after its own independent investigation with an originally written version of the news, there would be no copyright violation. If, on the contrary, the second newspaper merely followed the style of the original story in the first newspaper there would be a clear violation, as was decided in Chicago Record-Herald v. Tribune Association.[30]

Tribune Co. of Chicago v. Associated Press [31] presents an interesting phase of the problem involved in making use of stories protected supposedly under contract. The *Chicago Tribune* had a contract with the *London Times* so that the *Tribune* could make use of any material printed in the *Times*. Because of the favorable difference in time between Chicago and London, the *Tribune* staff man could send any selected material by cable; the *Tribune* copyrighted its entire newspaper in the United States. After the first edition of the *Times* was off the press, the Associated Press representative in London would select what material he wished and then cable his office in New York for general distribution to member papers. It frequently happened that the Associated Press carried material from the daily issues of the *Times* which were much like the material filed with the *Tribune* under its contract.

The *Tribune* sought an injunction to prevent the Associated Press from its practice of releasing material credited to the *Times* but claimed by the *Tribune* under its contract. The motion for an injunction was denied. The court held that there could be no general copyright of an entire newspaper when that newspaper contained matter not entitled to copyright.

It should be noted that the original *London Times* material was not copyrighted in the United States and that the Associated Press merely noted as a matter of news that the *London*

[30] 275 F. 797 (C.C.A.Ill.1921). [31] 116 F. 126 (C.C.Ill.1900).

Times made certain statements. The court's opinion may not be taken to mean that an entire newspaper may not be copyrighted, but merely that if an entire newspaper is copyrighted, the protection under the copyright statute protects only such material as might be subject to copyright protection by the copyrighting newspaper; in other words, if an entire newspaper were copyrighted, the copyright would not protect the news stories already released to the world by publication in another newspaper, material already copyrighted by others, or copyrighted comments by one news organization on what a foreign newspaper currently published.

The right to the copyright of a photograph, when there is a contract to have one's picture taken, belongs to the sitter; on the other hand, when a photographer takes a picture gratuitously and for his own benefit he is entitled to the right to the official copyright.[32] An actress through her publicity agent had her photograph taken on the provision that the photographer would grant a reduced rate provided he would have the privilege of copyright. The evidence indicated that her publicity agent acted within his authority. Later she was employed for a motion picture by the Pathe Exchange which instructed her to order a large number of photographic copies provided the copyright notice of the photographer would be removed. The photographer refused to remove the notice but sold a few copyrighted photographs to the Pathe Exchange, which then employed an artist who made drawings of the original photograph but changed the details of dress leaving the face of the actress unchanged. The drawing was then used in certain advertisements, which the court declared to be infringements of the original copyright; however, the suit was dismissed on the ground that deposit of copies and registration as a condition precedent of the right to maintain an action for infringement had not been technically complied with.[33]

In Altman v. New Haven Union Co.,[34] the graduating class of New Haven High School arranged with the plaintiff to take a class picture on the steps of the high school and provision was made that members of the class could purchase these photographs at $1.50 each. Shortly thereafter the class committee wished to have the photograph used for the class book. Inasmuch as the photograph was too large, it was cut down, leav-

[32] Lumiere v. Pathe Exchange, 275 F. 428 (C.C.A.N.Y.1921).

[33] Ibid.

[34] 254 F. 113 (D.C.Conn.1918).

ing off the background as well as the notice of copyright of the photographer. Without knowledge of the copyright the *Union,* a New Haven newspaper, published the photograph in its regular Sunday edition. In his suit for injunctive relief and damages, the plaintiff was successful. The court, in its ruling stated:

> *Where the photographer takes the portrait for the sitter* under employment by the latter, it is the implied agreement that the property in the portrait is in the sitter, and neither the photographer nor a stranger has the right to print or make copies without permission from the sitter. Where, however, the photograph is taken at the expense of the photographer and for his benefit, the sitter loses control of the disposition of the pictures, and the property right is in the photographer. So here, no other conclusion is possible, under the evidence, save the one here reached, that the plaintiff was the lawful owner of the right in the photograph, bound only to sell each photograph at a price not to exceed $1.50 to each member of the class desiring to purchase one. By no possible stretch of the evidence could it be said that the class had or owned the right in the photograph.[35]

The title of a newspaper is not the subject of copyright. The name or title of a newspaper is however given legal protection. If the name of the newspaper or periodical is actually in use as the name of a going publication, its name will have the protection of common law trade-mark; for another publication to use the same name would warrant injunctive relief on the ground of unfair competition, providing actual damage were shown by the publication originally making use of the title. The name of a fictitious or prospective publication, which never had been produced, would not be a common law trade-mark, because it had never been used in actual production of the publication. The trade-mark is of value only in connection with the actual use.[36]

The name of a newspaper or a periodical represents good will, which is of course an intangible asset of particularly great value in the case of a successful publication.

Registration of a title of a newspaper as a trade-mark has often been allowed by the United States Patent Office. Registration of a newspaper name becomes evidence of its use and validity. The purpose of the trade-mark is to identify the maker, or in the case of a periodical, the publisher, with his product; it is a business

[35] 254 F. 113, 118.

[36] Walsh, W. F., Principles of Equity, pp. 229–234.

right which gives the public knowledge that the product comes from a particular maker and so prevents the fraud of another palming off his product as that of another.

When a newspaper or periodical has ceased publication and no direct successor has taken over the previous business, it may be said that the name has been abandoned, and after all secondary meaning or identification of the particular name with a particular organization has been lost, the name becomes public property and may then be adopted by another publication.

§ 79. STATUTORY COPYRIGHT

Essentials in acquiring copyright protection include application, notice of copyright, deposit of copies in the Library of Congress, and payment of the required fee.

Originality is a fundamental principle of copyright; originality implies that the author or artist created the work through his own skill, labor, and judgment.[37] The concept of originality means that the particular work must be firsthand, pristine, not copied or imitated. Originality however does not mean that the work must be necessarily novel or clever, or that it have any value as literature.

What constitutes originality was explained in a frequently quoted case, Emerson v. Davies.[38] Justice Story stated:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern

[37] American Code Co., Inc. v. Bensinger et al., 282 F. 829 (C.C.A.N.Y. 1922).

[38] Fed.Cas.No.4,436 (C.C.Mass.1845).

> times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. * * *
>
> An author has as much right in his plan, and in his arrangements, and in the combination of his materials, as he has in his thoughts, sentiments, opinions, and in his modes of expressing them. The former as well as the latter may be more useful or less useful than those of another author; but that, although it may diminish or increase the relative values of their works in the market, is no ground to entitle either to appropriate to himself the labor or skill of the other, as embodied in his own work.
>
> It is a great mistake to suppose, because all the materials of a work or some parts of its plan and arrangements and modes of illustration may be found separately, or in a different form, or in a different arrangement, in other distinct works, that therefore, if the plan or arrangement or combination of these materials in another work is new, or for the first time made, the author, or compiler, or framer of it (call him what you please), is not entitled to a copyright. The reverse is the truth in law, and, as I think, in common sense also.

The question of originality seems clear in concept but this quality of composition is not always easy to separate and identify in particular cases, especially when different authors have conceived like expressions or based their compositions upon commonly accepted ideas, terms, or descriptions in sequence. It must be borne in mind that an idea as such cannot be the subject of copyright; to be eligible for copyright, ideas must have particular physical expressions, as signs, symbols, or words. As was stated in Kaeser & Blair, Inc. v. Merchants' Association, Inc.,[39] "copyright law does not afford protection against the use of an idea, but only as to the means by which the idea is expressed."

Artistic treatment is one element in the consideration of copyright but not an absolutely necessary element. One might compile a directory of residents of a city, giving names, occupations, places of business and residence; the individual's name and information about him and his residence cannot be subject of copyright, but when thousands of citizens' names are compiled, together with directory information about them, the whole forms a result that may be the subject of copyright. In Jewelers' Circular Pub. Co. v. Keystone Pub. Co.,[40] the court stated:

[39] 64 F.2d 575, 577 (C.C.A.Ohio 1933). See also Holmes v. Hurst, 174 U.S. 82, 19 S.Ct. 606, 43 L.Ed. 904 (1899).

[40] Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 281 F. 83, 88, 26 A.L.R. 571 (C.C.A.N.Y.1922).

> The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris,* or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author.

While such a compiler would have no right to copyright information on a mere listing of one man and his address and occupation, he would have a right to copyright a compilation of a large number of such names, their addresses, and occupations.

Copyrightable subject matter under the Act of March 4, 1909 as amended by the Act of August 24, 1912 includes the following:

> (a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations;
> (b) Periodicals, including newspapers;
> (c) Lectures, sermons, addresses (prepared for oral delivery);
> (d) Dramatic or dramatico-musical compositions;
> (e) Musical compositions;
> (f) Maps;
> (g) Works of art; models or designs for works of art;
> (h) Reproductions of a work of art;
> (i) Drawings or plastic works of a scientific or technical character;
> (j) Photographs;
> (k) Prints and pictorial illustrations;
> (l) Motion-picture photoplays;
> (m) Motion pictures other than photoplays;
>
> Provided, nevertheless, That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act.[41]

Special provisions are made for the copyright of unpublished works, such as sermons, lectures, and addresses prepared for oral delivery, as well as for other classes of copyrightable material.

For materials produced either from type or from lithographic plates, it is essential that such typesetting or preparation of plates, and binding have been done within the limits of the United States.[42]

[41] 17 U.S.C.A. § 5.

[42] 17 U.S.C.A. §§ 15, 16.

Statutory copyright for a published work is initiated through the publication of copyright notice on the published work. To fortify this claim, it is essential that an application be made to the Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C., that a fee be paid, and that the required copy or copies of the published work be deposited.

If a work is copyrighted, only that part is protected which is copyrightable. Work that is in the public domain, and work on which someone else holds a copyright may not be given protection as part of a new work.[43] The granting of copyright lends initial protection to the entire work, but it is left to the courts to determine how far the copyright extends on the content.[44] The use of material protected under common law copyright would constitute infringement.

Works of the United States Government or work published in this or a foreign country prior to the present Act taking effect are not copyrightable if not already copyrighted.[45]

A complete newspaper or a periodical of American manufacture may be copyrighted if notice of copyright is given on the publication, together with name of claimant and the yearly date under which the claim is established, when there is an application for copyright, payment of the required fee of $2.00, and deposit of two copies of the complete publication within a reasonable time after the application, and notice, as "Copyright 1944 by the Tribune Co."

If the article to be copyrighted is a newspaper story, the newspaper, having the story prepared, prints the same with such notice as "Copyright 1944 by Gazette Company," [46] deposits one complete copy of the newspaper containing the story to be copyrighted in the Copyright Office, or in the mails addressed to the Register of Copyrights, makes formal application for registration, and pays a fee of $2.00.[47]

Either the author or a publisher may copyright an individual article in a publication; in this case only one copy of the complete publication need be filed. A photograph may be copyrighted in

[43] American Code Co., Inc. v. Bensinger, 282 F. 829 (C.C.A.N.Y.1922).

[44] Sheldon v. Metro-Goldwyn Pictures Corp., 7 F.Supp. 837 (D.C.N.Y. 1934).

[45] 17 U.S.C.A. § 7.

[46] Sec. 18, Act of March 4, 1909, 17 U.S.C.A. § 18.

[47] See Sec. 61, Act of March 4, 1909, as amended May 23, 1928, 17 U. S.C.A. § 61.

the usual manner except that the fee is but $1 if no certificate of registration is desired. There is no extra charge for one certificate of registration in the case of a newspaper, periodical, or book, but for a photograph the certificate of registration costs $1 in addition to the regular filing fee of $1.

The copyright of a periodical or newspaper may be taken out by the publishing corporation, a partnership, or an individual proprietor; the copyright covers the page arrangement and all the copyrightable material in the publication. A publishing company may copyright its entire publication but this copyright does not protect material not subject to a new copyright because it is already copyrighted or because it has been published without statutory copyright protection and thus has through publication lost the protection of common law copyright. A new copyright must be taken out for each issue, and for each edition in which there has been a substantial change of material or arrangement.

In the case of maps, works of art, or models or designs for works of art, drawings or plastic works of a scientific or technical character, photographs, and prints and pictorial illustrations, the notice may consist of the letter C enclosed in a circle, thus: ©, accompanied by the initials, monogram, mark, or symbol of the copyright owner, provided that on some accessible portion the name of the owner shall appear.[48]

Notice of copyright in the case of a periodical or a newspaper is covered in Sec. 19, of the Act of March 4, 1909. Notice on a periodical of the magazine classification is to be on the title page, or upon the first page of text of each separate number or under the title heading.

Under earlier copyright legislation in the United States, deposit of copies was essential to the existence of copyright; however, under the Act of 1909, creation of copyright is obtained merely by the publication of copyright notice on the published work.[49]

Theoretically, the purpose of deposit of copies might be twofold: first, to aid effectually notice to the public as part of the registration process; second, to preserve copyrighted works for the benefit of future knowledge and reference. Actually, it would seem that effective notice of the copyright monopoly is obtained through notice on the work itself. And while deposit of copies

[48] Sec. 18, Act of March 4, 1909, 17 U.S.C.A. § 18.

[49] Washingtonian Pub. Co. v. Pearson, 306 U.S. 30, 59 S.Ct. 397, 401, 83 L.Ed. 470 (1938); 17 U.S.C.A. § 9.

does provide the Library of Congress with copyrighted materials, such deposit does not guarantee that such deposits shall be permanently maintained, for under Sections 59, 60 of the Act of 1909, the Register of Copyrights and the Librarian of Congress shall from time to time jointly decide what copyrighted publications are to be preserved; publications not thus selected may be destroyed.[50]

If deposit of copies is not made promptly, the Register of Copyrights may, upon notice, require the proprietor of the copyright to deposit copies in accordance with the requirement; if the deposit is not then made the proprietor of the copyright is subject to a fine of $100 plus twice the retail price of the copyrighted work.[51]

Deposit of copies of a work on which copyright notice is given has been the subject of sharp litigation. No infringement action can be maintained until the required deposit is made,[52] although actual copyright exists from the date of publication provided application was made, a fee paid, and notice of copyright was carried on the article or work so protected.

Any person who gives false notice of copyright, with intent to defraud, upon an uncopyrighted article, or removes or alters a copyright notice with intent to defraud, commits a misdemeanor and is subject to a fine of not less than $100 or not more than $1,000.[53]

The copyright, to be effective so far as protection against infringement is concerned, must be validated by compliance with all statutory requirements; otherwise, the copyright owner will find himself without means for legal redress. The copyright might thus become a hollow shell, for as Justice Reynolds stated in Washingtonian Pub. Co. v. Pearson,[54] "without right of vindication a copyright is valueless."

Ownership of a copyright and the right of vindication of such ownership are not necessarily parallel; the one does not necessarily include the other. This principle may be illustrated by the experience of the *New York Times* when it obtained an exclusive story of Capt. R. Amundsen's discovery of the South Pole. Both the *New York Sun* and the *New York Evening Journal* used the story, taking the essential facts from an early edition of the

[50] 17 U.S.C.A. §§ 59, 60.

[51] 17 U.S.C.A. § 13.

[52] 17 U.S.C.A. § 12.

[53] 17 U.S.C.A. § 29.

[54] Washingtonian Pub. Co. v. Pearson, 306 U.S. 30, 59 S.Ct. 397, 402, 83 L.Ed. 470 (1938).

Times. The *Times* immediately sought injunctions to stop further publication. The injunctions were served about midnight of March 8, but the evidence in the two cases revealed that the *Times* had not deposited the requisite number of copies either in the copyright office or in the mails addressed to the Register of Copyrights. The court held in both cases that inasmuch as the copies were not deposited at the time the application for injunctions was made, injunctions had no binding force.[55]

Although the records of these two cases use the words "deposit of copies," the courts, it is submitted, were in error so far as the plural was used. Section #12 of the Copyright Act specifies that if copyright is desired for a special contribution, *one* copy of the issue of the complete periodical must be filed. If, on the other hand, it is desired to copyright the entire publication or newspaper, two copies of the issue to be copyrighted must be filed. In this instance, the *Times* wished to copyright the single story.

In these cases the *New York Times* lost its suits against the *Sun* and the *Evening Journal* for their unauthorized use of the story because full compliance with Sec. 12 was not made at the time the injunctions were sought. That part of this section covering the decisions in question reads:

> No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.

Washingtonian Publishing Co., Inc. v. Pearson[56] held that mere delay in depositing of copies does not destroy the right to sue for damages for infringement of copyright; this holding does not abrogate the statutory requirement that no action can be instituted until the deposit of copies is made.

The facts in this case show that the plaintiff, publishing a monthly magazine, the *Washingtonian*, had in its last issue, December 10, 1931, a feature article written by Rixie Smith though appearing under the pen name of Linthicum Hall, and entitled "The Mills—of the Gods."

On Aug. 25, 1932, Liveright, Inc. as publisher and the Van Rees Press, Inc. as printer, brought out a book, "More Merry-Go-

[55] New York Times Co. v. Star Co., 195 F. 110 (C.C.1912); New York Times Co. v. Sun Printing & Publishing Ass'n., 204 F. 586 (C.C.A.N.Y. 1913).

[56] 306 U.S. 30, 59 S.Ct. 397, 83 L. Ed. 470 (1939).

Round" by Drew Pearson and Robert S. Allen. In this book there was a chapter entitled, "The Wizards of Reconstruction," which contained material substantially identical with the previous article by Rixie Smith in the December, 1931 issue of the *Washingtonian*. On the book, notice of copyright was given and Liveright, Inc., the publisher, deposited two copies with the Register of Copyrights in accordance with the provisions of the statute, paid the required fee, and obtained a certificate of registration. It happened that the *Washingtonian* claimed copyright on the contents of its issue of Dec. 10, 1931 on the basis of notice of copyright. The publishers of the *Washingtonian* made no immediate deposit of copies, and it was not until February 21, 1933, that the plaintiff made deposit of copies of the magazine and payment of the fee. A certificate of copyright was granted. On March 8, 1933, the plaintiff instituted suit charging that the book "More Merry-Go-Round" infringed the Rixie Smith article. The suit was dismissed in the Supreme Court of the District of Columbia [57] (changed in 1936 to the District Court of the District of Columbia), but on trial in the District Court of the District of Columbia later, the judgment was for the plaintiff; [58] this judgment was in turn reversed by the United States Court of Appeals.[59] In the Supreme Court of the United States [60] the judgment of the court of appeals was reversed and the case was remanded to the District Court of the District of Columbia. Thus the delay in depositing copies did not defeat the plaintiff's right to sue for infringement.

Copyright may be taken in the name of the author or the copyright proprietor, who may be either one who employs others to do work for him or who may have been assigned the right of copyright by the author himself.[61] Divisional copyright does not exist under the present copyright law; protection for supplementary rights, such as serial or motion picture rights, must be protected by contractual provision between the proper parties.

The author may assign his renewal interest in copyright during the original copyright term. This interpretation was given in Fred Fisher Music Co., Inc. v. M. Witmark & Sons [62] concerning the assignment of renewal rights for the popular song "When

[57] 25 U.S.P.Q. 83 (1935).

[58] 32 U.S.P.Q. 113 (1936).

[59] 68 App.D.C. 373, 98 F.2d 245 (1938).

[60] 40 U.S.P.Q. 190, 306 U.S. 30, 59 S.Ct. 397, 83 L.Ed. 470 (1939).

[61] 17 U.S.C.A. § 8.

[62] 318 U.S. 643, 63 S.Ct. 773, 87 L. Ed. 1055 (1943).

Irish Eyes Are Smiling." The Copyright Act of 1909 does not nullify an author's agreement to assign his renewal interests.

Copyright exists for a period of twenty-eight years.[63] It may be renewed by the author for a similar period of twenty-eight years. In case the author is not living at the expiration of the original twenty-eight year period, renewal may be made by the widow, widower, or children of the author, or by the executor or executrix if there be no widow, widower, or children, or by the author's next of kin,[64] if there is no will covering the disposition of the copyright.

The right of renewal is personal [65] and does not follow the author's estate; rather the right of renewal is wholly statutory.[66] Regarding this personal attribute of copyright, the court in Harris v. Coca-Cola Co.[67] stated:

> The great purpose of a copyright is to secure to authors and artists the financial fruits of their own mental labors. The initial copyright period is frequently assigned to a publisher with but little gain to the author. If the work proves meritorious and successful, the author may have had but little benefit. The second period is intended, not as an incident of the first for the benefit of the then owner of the expiring copyright, but as a second recognition extended by the law to the author of work that has proven permanently meritorious by giving directly to him, if alive, or, if not, to his widow, children, next of kin, or executor (but not to an administrator who may represent no relative and no wish of the author), a supplementary copyright upon the terms stated in the statute.

An unpublished manuscript may be inherited by another, or it may be the subject of adverse possession. In O'Neill v. General Film Co.[68] the court stated:

> The plaintiff * * * having been for 30 years in continuous and open and notorious possession of the play, and having throughout said period successfully maintained exclusive right thereto against the world, has valid title to the play by adverse possession. * * * Property in a manuscript or in the literary production embodied therein is not distinguish-

[63] 17 U.S.C.A. §§ 23, 24.

[64] Ibid.; see also Fox Film Corporation v. Knowles, 261 U.S. 326, 43 S. Ct. 365, 67 L.Ed. 680 (1923).

[65] White-Smith Music Publishing Co. v. Goff, 187 F. 247 (C.C.A.R.I. 1911).

[66] Danks v. Gordon, 272 F. 821 (C.C.A.N.Y.1921).

[67] 73 F.2d 370, 371 (C.C.A.Ga.1934).

[68] O'Neill v. General Film Co., 152 N.Y.S. 599, 603 (Sup.1915).

> able from any other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefits of all the remedies accorded to other property, so far as applicable.

What constitutes a proprietor has been the subject of special interest to newspapers. Public Ledger v. New York Times et al.[69] may be taken as an illustration. The *Philadelphia Public Ledger* made a contract with the *London Times* by which the *Times* would provide an office in London to which it would furnish "proofs" of all special news articles and other editorial material published at as early as reasonably possible so that the *Ledger* representative could prepare such copy as it wished therefrom for transmission for publication in newspapers in the United States and Canada. It was further provided that whenever possible the *Times* would provide "proofs" sufficiently ahead of the release date in London so that these "proofs" could be mailed to Philadelphia, and so that the plaintiff, the *Public Ledger,* could arrange to sell such news and articles to American and Canadian newspapers. It was agreed that the *Public Ledger* would publish all editorial material thus received under the heading "London Times News Service," and to secure the same arrangement with any other publications buying this service from the *Public Ledger.* The *Times* agreed to provide this service to no other publication in either the United States or Canada, and to accept from the *Ledger* a consideration of £150 a week in remuneration for such service.

The *Ledger* gave notice of copyright in each of its issues and deposited copies in the Library of Congress in accordance with the Copyright Act.

In 1920 the *London Times* published a letter written by Viscount Grey upon the attitude of the United States Senate regarding the League of Nations, securing copyright in Great Britain. According to the contract the plaintiff, the *Public Ledger,* became the assignee or partial assignee and vested with the exclusive right at common law to secure copyright for this letter in the United States. The "copy" was cabled to the *Public Ledger* on January 31, the day of its publication in London; however, the copy was received so late in Philadelphia that the story was not published in the *Ledger's* issue of January 31. The story appeared in the *Ledger's* issue of February 1, although early copies of the February 1 issue were actually distributed on the evening of January 31.

[69] 275 F. 562 (D.C.N.Y.1921).

The *New York Times*, the defendant in this case, printed the Viscount Grey letter on February 1, having taken the material from the *London Times* issue of January 31 through the London correspondent of the *New York Times*. The *New York Times* then attempted to copyright the letter in the United States.

The *Public Ledger* sought injunctive relief, delivery of plates, and accounting for profits and damages, as well as general relief. The basis of the suit was unfair competition and infringement of copyright, allegedly held by the *Public Ledger*.

In the action for infringement, the court held that the *Public Ledger* was not the proprietor of the copyright, and not being the author, would not under the Federal statute have the right to copyright the particular letter and story. To entitle the *Public Ledger* to the status of proprietor, there would have had to be a full transfer of rights; [70] in this transaction the *Public Ledger* was a mere licensee. If the original proprietor retains any rights to the property there would not be an assignment. Under the Federal copyright statute, there is no provision for a licensee to obtain a copyright; therefore, the suit on the copyright infringement failed. On the second action, maintaining that the *New York Times* was guilty of unfair competition, the court refused to dismiss.

In stating without foundation that the *New York Times* had permission of the *London Times* to publish the story, the defendant informed its readers in effect that the *Public Ledger* did not have exclusive right to publication of the Grey letter in the United States. Said the court:

> As the plaintiff's right to resell the news was dependent in large measure upon the exclusiveness of its relations with the *Times*, this might, and probably would, be highly injurious to its business as a news seller. Furthermore, the plaintiff was entitled, and indeed obliged, under the contract to advertise its articles as under the "London Times News Service." Its readers would naturally attribute less value to that service if they learned that it was shared with the defendant. These consequences are real injuries, and, if they result from false statements by the defendants, they are actionable.[71]

The infringement suit was appealed to the circuit court of appeals, which affirmed the decree of the lower court, on the ground

[70] New Fiction Pub. Co. v. Star Co., 220 F. 994 (D.C.N.Y.1915).

[71] Public Ledger v. New York Times, 275 F. 562, 565, 566 (D.C.N.Y. 1921).

that the plaintiff was without authority to copyright the editorial material in question under the Federal statute.[72]

Another leading case on the question of proprietorship of copyright likewise involved the *Philadelphia Public Ledger,* Public Ledger Co. v. Post Printing & Publishing Co.[73] In 1917 James W. Gerard, former ambassador to Germany, and Cyrus H. K. Curtis entered into a written agreement whereby Mr. Gerard would prepare a manuscript, "My Four Years in Germany," and whereby Mr. Curtis would have the serial and book rights, "but after the first edition of the book has been published, or eight months after the manuscript has been delivered," the copyright would revert to Mr. Gerard. Mr. Curtis agreed to pay Mr. Gerard $50,000 on this contract. Later the parties made another written agreement to the effect that Mr. Curtis should obtain valid copyrights for the books in the United States and six other countries, and "said copyright to be in the name of said Gerard, or in the name of the said Curtis, and said Curtis agrees to assign the copyright, if taken in his name, to said Gerard on or before the 1st of March in the year 1918, on which date all copyrights are to revert to the said Gerard." In the trial it was shown that Mr. Curtis owned all but five shares of the Public Ledger Co., that he signed the contract with Mr. Gerard on behalf of both himself, Curtis, and the *Public Ledger,* that Mr. Gerard fairly understood that the work was to be written for and published in the *Public Ledger,* that Mr. Curtis paid $50,000 on the contract, and was repaid by the Public Ledger Co. The lower court dismissed the bill on the grounds: that the word "proprietor" has the same meaning as the word "assign"; that the *Public Ledger* was a licensee, not a proprietor; that a licensee cannot obtain a copyright. The circuit court of appeals, affirming the district court's decree, stated its position as follows:

> The written contracts, the evidence, the better reasons, and the greater weight of authority seem to us to converge with compelling force to the conclusion that the plaintiff in this case was not the proprietor of the work of Mr. Gerard, or of rights in it which qualified it to obtain a valid copyright. * * * The case is simple. The plaintiff claimed a copyright of a literary work of another which the defendant published. If it had a valid copyright, it might be entitled to a decree for damages or profits. If it had no such copyright, it could recover nothing on account of that publication, and the burden was on the plaintiff to prove a valid copyright in itself, a burden which it was unable to bear. The crucial question

[72] 279 F. 747 (C.C.A.N.Y.1922). [73] 294 F. 430 (C.C.A.Mo.1923).

> recurs: Was the plaintiff corporation the proprietor of Mr. Gerard's work, or of any installments of it, in August and September, 1917, in such a sense that it was qualified to secure and hold a copyright thereof? * * * In our opinion the Public Ledger Company never became a proprietor of Mr. Gerard's literary work.[74]

A contract to grant to another serial rights in a serial story does not give the party thus obtaining these serial rights the right to copyright; rather such party would be a *licensee*, who, if a copyright were ostensibly secured, would have a void copyright, according to New Fiction Pub. Co. v. Star Co.[75] These cases show clearly the necessity of knowledge of the legal rights to literary property on the part of both authors and publishers. The character of these cases cited in this consideration of proprietorship of copyright and especially the importance and the financial standing of such litigants as the *Philadelphia Public Ledger* and the *New York Times* may be taken as sufficient warning against careless understanding of this important subject.

An employer may be regarded as an author when a literary work is made for hire.[76] This rule means that a newspaper or a syndicate for example may employ a writer or artist to create articles or cartoons, or to take photographs for the employer's use or sale. Brown v. Molle Company [77] illustrates an application of the principle; although the facts of the case concern radio, the rule in law would be the same in its application to newspapers or magazines. In this case Brown was employed to produce a radio program in which a theme song was considered of distinctive value. Brown prepared a song, which apparently at first he did not consider his property, for there was no additional remuneration for the writing of the song and Brown did not take out a copyright until about six months after its completion. The music was identical with the "West Point Caisson" song by E. L. Gruber, and was either in the public domain or the property of Gruber, who never gave his consent to the use of the music. Later Brown left his employer, the Stack-Goble Advertising Agency, and then undertook to copyright the song.

Brown's bill was dismissed, and in the opinion of the court the words of the song belonged to the advertising agency in trust for the Molle Company.

[74] Ibid., 435, 436.

[75] 220 F. 994 (D.C.N.Y.1915).

[76] Copyright Act March 4, 1909, Sec. 62, 17 U.S.C.A. § 62.

[77] 20 F.Supp. 135, 35 U.S.P.Q. 183 (D.C.N.Y.1937).

Uproar Co. v. National Broadcasting Co.,[78] while not denying the principle cited above, reaches much the same result though upon another basis. In this case the Texas Company, a large distributor of oil and gasoline products, employed Ed Wynn, a nationally known comedian, to broadcast on its programs. Wynn was to receive $3,500 for each broadcast, and $1,500 additional if he prepared the material. The broadcasts were highly successful, and so Wynn or his associates determined that considerable profit could be made in publishing the programs in pamphlet form. The weekly pamphlet, titled "Uproar" was sold for ten cents a copy. The Uproar company forthwith planned to announce the pamphlet shortly after the regular Wynn-Texas Company broadcast, but the Texas company objected on the ground that the company owned the literary property in the regular Wynn program and further on the ground that the broadcast advertising the pamphlet would injure the value of its own broadcasts. The Uproar Company began an action in law to recover damages for alleged conspiracy between the defendants to interfere maliciously with contracts made to advertise its pamphlets and books. The defendant interposed equitable defenses. A decree was given in favor of the defendants. The ruling of the circuit court of appeals was that the plaintiff could not maintain the action and that the decree in enjoining its doing so was affirmed. The second clause of the decree enjoining it from publishing the material of the Wynn broadcasts was broadened to prevent in effect any interference with the benefits which the Texas Company might derive from its advertising contract with the comedian, Wynn. It was pointed out by the court that in every contract there exists an implied covenant that neither party shall commit any act whereby the right of the other party to receive the full benefit of his contract will be impaired.

Literary property in a comic strip may be in either the artist or in the employer, depending upon the terms of the contract of employment. The cartoonist may copyright his individual cartoons and have the title of the strip registered as a trade-mark, syndicating the cartoons himself, or making a contract with a syndicate for their placement and sale. On the other hand, the employer, a newspaper or a feature syndicate, may through its executives and editors conceive a certain type of comic strip and employ an artist to execute such plans; in such an instance, the newspaper or syndicate would be entitled to copyright the indi-

[78] 81 F.2d 373 (C.C.A.Mass.1936).

vidual cartoons and to register the comic strip as a trade-mark in the United States Patent Office. Under the existing statutes, either business procedure would be legal and in keeping with established practices of the journalistic enterprises.

§ 80. INFRINGEMENT

Violation of copyright embraces such use or copying of an author's work that his possibility of profit is lessened.

The protection afforded the copyright owner covers all pecuniary benefit resulting from the author's intellectual product. The author, or proprietor, is entitled, under the temporary monopoly given by compliance with the copyright statute, to any lawful use of his literary property whereby he may make a profit.

The violation of copyright is a tort or civil injury and all persons concerned in the infringement are jointly liable as tort-feasors.[79] While the term, infringement, is not defined in the Federal statutes, its meaning is assumed to be one fully recognized by the law.[80] Infringement as interpreted by the courts means the copying of some substantial and material part of a literary work, protected either under the Copyright Act or under common law, without the permission of the copyright owner. Under the Copyright Act, infringement means the violation of the copyright protection so as to deprive or tend to deprive a copyright owner of his possible profits from his literary or artistic endeavors.[81]

"The test," it was stated in Nutt v. National Institute for the Improvement of Memory, "is whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant's work." [82]

It should be noted that while there is some similarity in copyright infringement and unfair competition cases, copyright is in the main statutory, while unfair competition, except for legislative enactment in such special cases as patents and trade-marks, depends upon the principles of equitable jurisprudence.

[79] Gross v. Van Dyk Gravure Co., 230 F. 412 (C.C.A.N.Y.1916); American Code Co., Inc. v. Bensinger, 282 F. 829 (C.C.A.N.Y.1922); Browne Music Co. v. Fowler, 290 F. 751 (C.C.A. N.Y.1923).

[80] Eggers v. Sun Sales Corporation, 263 F. 373 (C.C.A.N.Y.1920).

[81] Wilson v. Haber Bros., 275 F. 346 (C.C.A.N.Y.1921).

[82] Nutt v. National Institute, Inc., for the Improvement of Memory, 31 F.2d 236, 237 (C.C.A.Conn.1929).

Copyright infringement is one form of infringement of intellectual property. It is not an infringement to use the ideas of another, but it is an infringement to use the particular rhetorical expression of another. As was stated in Dymow v. Bolton,[83] "one of the entities or things which every author tries to insert in his copyrighted work is a set of ideas; yet ideas as such are not protected." If an idea may be expressed in a multiplicity of manner, there then could be a multiplicity of copyrights for the several forms of expression of the idea. In Ansehl v. Puritan Pharmaceutical Co.[84] the court noted, "The plaintiff is not entitled to be protected in his ideas, but he is entitled to be protected in his expression or illustration of his ideas."

The infringement of a trade-mark rests in the copying of a mark for identification of goods or the simulating of such a mark so that in effect one person's goods are palmed off for another's goods, thus deceiving the purchaser and depriving the maker or seller of the goods, first identified with the particular mark, of his profits. The trade-mark is merely the identification of the maker for the purpose of standardizing a certain brand or product of commerce, and of permitting both seller and buyer to know the particular product. The trade-mark serves to identify a product that is used in commerce; the right of trade-mark is founded upon the common law and its protection lies both in infringement suit under the Federal statutes and in the broad principles of equity that lend protection against unfair competition.

The trade-mark upon a product does not prevent the manufacture of a similar product for the same purpose; the trade-mark serves only to prevent the deception which would ensue if a manufacturer adopted another's trade-mark for his own similar product.

Quite different is the right of the patentee, who enjoys a temporary monopoly to the thing or the design patented; it is an exclusive right to make, use, and to vend. The patentee need not use his product, but can, without its use, protect any patent right which he may possess.

The copyright owner likewise has a temporary monopoly under the Federal statute; his copyright does not lie in a thing, but rather in a manner of literary expression. The copyright owner benefits from the sale of the product, although the product itself

[83] 11 F.2d 690, 691 (C.C.A.N.Y. 1926); see also Holmes v. Hurst, 174 U.S. 82, 19 S.Ct. 606, 43 L.Ed. 904 (1899).

[84] 61 F.2d 131, 137 (C.C.A.Mo.1932).

may be resold time and again; his protection is in the right of the first sales. While no two persons could have the same trademark, and no two persons could have the same patent, two different persons might write books on the same subject, or compose news stories on the same subject or event and both could be copyrighted, provided the manner of expression were different. In Pellegrini v. Allegrini,[85] the court gave the following explanation of the distinctions herein discussed:

> A patentee has the right to the thing patented, or to the design patented. It is the exclusive right to make, use, and vend a thing. The trade mark owner, or the manufacturer whose make of anything has become known in trade circles as his make, has the sole right to sell his product as his. The copyright holder has the exclusive right to sell his copyrighted work of art. This means the right, not to a thing, but to the form of a thing. This is really not a material thing, but barely more than a concept. It is something which appeals to the artistic sense; something which gives rise to a perception of artistic merit in the object.

The nature of a patent right was well expressed by Chief Justice Taney in Bloomer v. McQuewan [86] as follows:

> The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States. And the interest he acquires necessarily terminates the time limited for its continuance by the law which created it. The patentee cannot call it for a longer time. And the purchaser buys with reference to that period; the time for which exclusive privilege is to endure being one of the chief elements of its value. He therefore has no just claim to share in a further monopoly subsequently acquired by the patentee. He does not purchase or pay for it.
>
> But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different ground. In using it, he exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in his way. And

[85] 2 F.2d 610, 612 (D.C.Pa.1924).

[86] 14 How. 539, 549, 14 L.Ed. 532 (1852).

> when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.

The infringer of a patent violates the franchise given the inventor by the government; the infringer of a trade-mark violates the rights to identification of goods established at common law and protected in equity so that the public will not be defrauded; the owner of the trade-mark is damaged by means of other's goods being sold under the impression that the goods are those of the rightful owner of the trade-mark.

To what extent copyright protects its owner may well be seen in King Features Syndicate v. Fleischer,[87] in which it was held that copying is not confined to a literal repetition but includes various modes in which the matter of any publication may be adopted with more or less colorable alteration.

The King Features Syndicate owned the copyright of a book of cartoons known as "Barney Google and Spark Plug," and for a considerable period furnished newspapers with a cartoon which the feature syndicate had prepared by its employee. The cartoon character, known as Barney Google, depicted a man in ludicrous situations together with a grotesque race horse, known as Spark Plug. The syndicate by contract with the cartoonist had the exclusive right to this production, including the right to copyright, vend, and reproduce such productions.

The infringer reproduced a substantial portion of the material copyrighted and used advertisements in two trade papers, *Playthings* and *Billboard;* however, the substantial phase of infringement was the manufacture and sale of a grotesque toy, the exact reproduction of the horse, "Spark Plug" or "Sparky," made by the appellees as licensees under a design patent application for a stuffed doll, the design of which duplicated "Sparky." The question was whether the production of the toy infringed the copyright. It was held that there was infringement, thereby reversing the decree of the lower court which had denied the motion for an injunction and had granted the defendant's motion to dismiss. The court in its opinion stated:

> It is the commercial value of his property that he (the author) is protected for, to encourage the arts by securing to him the monopoly in the sale of the object of the attraction. * * * The form of the horse, embodying the aspect of humor, was

[87] 299 F. 533 (C.C.A.N.Y.1924).

> the essence of the cartoon; its end, within the artist's purpose, and its object, the production of amusement in contemplation. We think the copyright law was intended to give protection to the creation of that form, protection to its value in that form, to give amusement in contemplation. * * * The artist's concept of humor was embodied in the copyrightable form, was addressed to the contemplation of the observer and the reader; its essence was the concept of humor which the form embodied. We think it cannot be copied, by manufacturing a toy or doll as the appellees did, without taking the copyrightable form of that concept, and without at the same time taking commercial value—the fruits of the cartoonist's genius which consisted in his capacity to entertain and amuse.[88]

In Hill v. Whalen & Martell, Inc.,[89] the complainant was the licensee of certain cartoon characters, "Mutt and Jeff"; the defendants produced a theatrical production, "In Cartoonland," in which there were characters costumed like the traditional figures of "Mutt and Jeff" and produced similarly in action and speech. The court enjoined the defendants on the ground that the representations of these characters were intended to injure the copyright of the cartoon, stating "a reproduction in materials of the copyrighted cartoon character, it would seem, is equally a violation of the copyright of the cartoon." The same conclusion is supported by leading English cases.[90]

The infringer of a copyright copies substantially the manner of presentation of ideas, passing off his work as his own and thus depriving the original writer or copyright owner of his possibility of larger financial returns.

It should be noted that certain copying of a copyrighted work does not constitute infringement, provided either that the original copyright owner consents to such citation or copying, or providing that fair use is made of copyrighted material.

Infringement of copyright in order to constitute actionable damage must show evidence of substantial copying. In Perris v. Hexamer,[91] the court stated:

> A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or

[88] Ibid. at pages 536, 537, 538 (C.C.A.N.Y.1924).

[89] 220 F. 359 (D.C.N.Y.1914).

[90] See cases cited in 299 F. 533.

[91] 99 U.S. 674, 675, 25 L.Ed. 308 (1878); Sherrill v. Grieves, 57 Wash. L.Rep. 286 (Supreme Court, District of Columbia, April 23, 1929).

printed. It follows that to infringe this right a substantial copy of the whole or of a material part must be produced.

Actual copying, or such rewriting of material as to be equivalent to copying, was early held the only type of infringement; however, in the diversity in types and purposes of printed materials, a larger conception of copyright has evolved. In West Pub. Co. v. Edward Thompson Co.[92] it was stated:

> *Actual copying or such paraphrasing as to be equivalent to copying, was at first considered to be the only form of* infringing use of copyrighted material. But the great diversity of printed publications, and the many phases of literary activity, especially when applied to minor pursuits, ultimately forced the construction of the copyright statute, in which the basis of injury is found in the unfair use of the material of the work in making up a book of similar nature, as well as in a direct copying or paraphrasing of the words therein contained. This extension of the law of copyright brings the case closely into the realm of unfair competition.

Paraphrasing is definitely infringement in that the essential facts "in the very garb wherein the author clothed them, together with some of his deductions and comments thereon in his precise words, and all with the same evident purpose of attractively and effectively serving them to the reading public," [93] are given.

It would seem, therefore, that if one literary production paralleled another in having essentially the same general rhetorical style though different words and expressions are used in part, if the sequence of ideas is the same throughout the presentation, and if the development of each topical thought in concept and synonym takes the pattern of another work, there would be infringement, especially if the purpose of the entire work were the same as the one originally conceived, written, and placed upon the market.

If two reporters report the same event, naturally both writers working independently, or two editorial writers discuss the same subject, or two authors prepare a treatise on the same topic, there will be considerable similarity, though the two parallel productions in any category may be entirely independent. In covering a convention for example, several reporters may have access to the same manuscripts of various speakers, and the same press releases of the publicity department handling the particular meeting; the sequence of thought development, expressions,

[92] 169 F. 833, 853 (C.C.N.Y.1909).

[93] Chicago Record-Herald Co. v. Tribune Association, 275 F. 797, 799 (C.C.A.Ill.1921).

order of quotations, and program items may be essentially alike, and yet there may be no infringement. In such a case, the source material would be practically the same for all. Likewise, in covering a significant event, there might be considerable parallelism between two pieces of literary work, but because both have common and freely available sources with an almost identical time release, no actual infringement would result. In difficult cases there must be applied special tests in order to determine infringement.

In West Publishing Company v. Edward Thompson Company,[94] the reasoning to be followed in determining whether there has been actual infringement was stated as follows:

1. Infringement consists of the violation of the exclusive right conferred by the statute.
2. The exclusive right conferred by the statute is "the sole liberty of printing, reprinting, publishing * * * and vending" the copyrighted matter, i. e., the exclusive right of multiplying copies.
3. Hence, there can be no infringement of copyright unless there has been copying, either in whole or in part of the copyrighted work.

The plaintiff has the burden of proving the originality of the copyrighted work in order to recover on an alleged infringement.[95] It is only this element of originality that gives a legal basis for copyright.

In applying the several tests of infringement, the doctrine laid down in Rush et al. v. Cursler et al.[96] stated the problem plainly:

> The inquiry always is: What, if anything has been appropriated; and then, whether the appropriation was of copyrighted material and was substantial.[97]

The same test was applied earlier in Dymow v. Bolton et al.[98] It was followed also in Lowenfels v. Nathan et al.[99] In Underhill et al. v. Belasco,[100] David Belasco, a theatrical producer, was sued for infringement of a copyrighted play, "The Cradle Song." It was alleged that the Belasco production, "Marie Odile" constituted an infringement. The bill was dismissed in the United States District Court which stated in part:

94 169 F. 833, 861 (C.C.N.Y.1909).

95 Hoffman v. Le Traunik, 209 F. 375 (D.C.N.Y.1913).

96 39 F.2d 468 (D.C.N.Y.1930).

97 Ibid., 472.

98 11 F.2d 690 (C.C.A.N.Y.1926).

99 2 F.Supp. 73 (D.C.N.Y.1932).

100 254 F. 838 (D.C.N.Y.1918).

> Except for some extraordinary developments, such as, for instance, have happened in the way of instruments of war in the present war, there is rarely anything that is physically new. Convents are old. The theme of a foundling in some relation or another is old. The conduct of persons in any given walk or department of life—that is to say, the normal conduct—is ordinarily old and well known. The task which is presented to the playright is to weld together these old elements with some fundamental or controlling theme in such a manner as to make a successful appeal, either artistically or financially, or both. Except for the fact that the scene of both plays is in a convent, and that of necessity there are some similarities of dialogue and language, the two plays are essentially and fundamentally different. * * * There probably is not a play in the history of the world that has not something that is to be found in some previous publication, either in drama, or in fiction or poetry, or some form of literary endeavor; but infringement cases are never decided upon so narrow a basis. The safest guide is always to determine what the fundamental theme is and to see whether it has been appropriated.[101]

In Hill v. Whalen & Martell, Inc.,[102] the extent of a criticism becoming an infringement was discussed as follows:

> A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. It is not always easy to say where the line should be drawn between the use which for such purposes is permitted and that which is forbidden.
>
> One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much as has been reproduced will materially reduce the demand for the original.

Such use must be distinguished from a criticism of a work so that the demand is lessened. By lessening the demand for the copyrighted work because of using the same conceptions, appeals, style, and routines though in slightly different form would clearly constitute infringement, for the criticism would be a substantial counterpart. But a criticism that happened to lessen the demand for a copyrighted production because the criticism concerned the quality of the production would not be an infringement.

Does the proprietor of a statutory copyright have thereby the right to control the price of the copyrighted material as sold to the public? This question was an important one in Bobbs-Merrill

[101] Ibid., 838, 839, 840, 842.

[102] Hill v. Whalen & Martell, Inc., 220 F. 359, 360 (D.C.N.Y.1914).

Co. v. Straus,[103] in which the plaintiff brought suit for infringement of copyright and injunctive relief against the policy of defendants in selling the copyrighted material, a book, at any price less than the one fixed by the copyright owner. The facts show that the defendants purchased large numbers of the volumes at a discount and then offered them for sale at less than the price set by the publishers.

It was held that the copyright itself gave no additional right to control the price of the copyrighted book. The copyright does give its owner the right to multiply copies of the copyrighted material for his own profit. Once the copyrighted material is sold, the purchaser of an individual copy of the material has full title and this right of ownership gives him the right to do with the individual copy or copies as he pleases. He may use them, destroy them, give them away, or sell them as he wishes. However, the purchaser of an individual copy of the protected work does not have any right to multiply copies. Similarly, the purchaser of a ticket to a theater does not have the right to make other copies of the ticket, which entitles him to admission to the particular amusement.[104] Once the title to a piece of property passes to another, the property in the individual product is alienated from the vendor and the full right to control the product lies in the vendee, so far as that unit of the product is concerned, unless there is some special contract between the vendor and vendee, as in the case of a license of a patented article by the patent owner, a situation in which there would not be a sale of the property unit itself.

The infringer of a copyright is liable to injunctive relief restraining such infringement and to damages the copyright proprietor has suffered by virtue of such infringement, together with payment of the profits made as a result of such infringement. If the infringer were not aware of the infringement, the damages would not be less than $250 or more than $5,000; in case of such infringement of a newspaper photograph, the damages would not be less than $50 or more than $200;[105] these limitations do not apply after the infringer has had notice of alleged infringement or when provisions for particular types of infringement are specified.[106] Willful infringement subjects the infringer to prose-

[103] 147 F. 15, 15 L.R.A.,N.S., 766 (C. C.A.N.Y.1906).

[104] Drone, E. S., Law of Property in Intellectual Productions, p. 12.

[105] 17 U.S.C.A. § 25.

[106] Ibid.

cution for a misdemeanor, and upon conviction the infringer may be punished by imprisonment of not more than one year and a fine of not less than $100, or more than $1,000, or both, upon the court's discretion.[107]

[107] 17 U.S.C.A. § 28.

CHAPTER 15

REGULATION OF ADVERTISING

Sec.
81. Laissez-Faire or Self-Regulation.
82. Publishers Institute Censorship.
83. The Printers' Ink Statute.
84. Liability of the Advertiser.
85. Administrative Controls.
86. Promulgation of Law.
87. Legal Advertising.

§ 81. LAISSEZ-FAIRE OR SELF-REGULATION

Many publishers sense the responsibility advertising owes the public to free the press from fraud and chicanery.

Advertising as an economic force is an established enterprise; it provides large income for newspapers and periodicals and thus gives financial stability to the press. There is little question that some advertising has been tricky, misleading, and false. Better publications in recent years have realized fully that advertising as a business has a definite obligation to the public; that unless advertising in their publications is truthful and serviceable, the public will react unfavorably. Such a consideration may be regarded as a corollary of Gresham's law of money. Bad advertising drives out good advertising as much as bad money drives good money out of circulation.

Before advertising grew up or became established as a highly organized business, with some modicum of a professional aspect on the part of various types of advertising experts, the philosophy motivating advertising was largely *laissez-faire*. There was little or no regulation; what would be termed unreliable copy was used by even fairly respectable newspapers and periodicals, and the principle tentatively accepted that the advertising columns were an open business forum with space for sale to all who applied. There were of course exceptions.

The advertising of that day had no established ethical basis. The liar and the cheat capitalized glorious claims for dishonest, shoddy merchandise. The faker lured the ill and suffering to build hopes on pills and tonics of questionable composition. Cures were promised by the bottle. Fortunes were painted for those

who invested in mining companies of questionable reliability. Foods were frequently adulterated. Fifteen dollar suits were offered as worth $25. Faked testimonials praised dishonest or unproved wares. Manufacturers of these products were able to buy advertising space in seemingly reputable journals.

Exposés of advertising frauds and misleading representations to the unsuspecting consumer have been the vogue in recent years. This movement has been in part inspired and supplemented by the various consumer projects, such as Consumers' Research. Considerable muck-raking literature has appeared.[1]

Experience in the stock boom of 1920–1929 proved that misplaced confidence in business possibilities, misinformation, and failure to heed economic clouds of disaster all contributed to great losses, in fact, losses that the public could ill-afford to bear. The financial crash of 1929 pricked the bubble of many financial dreams and brought suffering and financial loss to millions. While many who speculated gladly accepted their gains, they perhaps deserved their later losses; many knew the risks involved but went blindly ahead. Some cannot be blamed for they followed blind and unsound leadership. There were hundreds of thousands of other stockholders in many sound enterprises who invested on the ground of unsound information and questionable advice; this latter class needs protection.

In the palmy days of the 1920's the investment trust was in vogue. This form of investment seemed sound and acceptable to persons in retirement, widows, and other small investors. The great losses of some of these so-called investment organizations are the antithesis of what such organizations are supposed to be. One Chicago investment trust was organized in September, 1929, and with approximately $60,000,000 in cash, went into the market and bought securities at top prices; its unrealized losses were $4,619,214. A New York investment trust went into the market with approximately $100,000,000 and invested in high priced securities; in about three months these investments shrunk more than $7,500,000 below what they had cost. The prize fiasco for losses was another New York in-

[1] Chase, Stuart, and Schlink, F. J., Your Money's Worth (1927); Harding, Thomas Swan, Fads, Frauds, and Physicians (1930); Phillips, Mary Catherine, Skin Deep (1930); Kallett, Arthur, and Schlink, F. J., 100,000,000 Guinea Pigs (1933); Rorty, James, Our Master's Voice (1934); Schlink, F. J., Eat, Drink and Be Wary (1935); Lamb, Ruth de Forest, American Chamber of Horrors (1936).

vestment trust organization which showed an actual shrinkage of $121,404,839 on the basis of the 1928 inventory price.[2]

Formation of the Security and Exchange Commission in 1934 went a long way in preventing fraudulent promotion and investment schemes. The lure of great profit has been the bait for unsound schemes and deliberate fraud. Various forms of advertising have been utilized to ensnare the gullible and uninformed. The number of victims of fraudulent schemes is legion; the losses over a period of years would likely run into hundreds of million dollars.

Huge financial losses may be incurred in legitimate business enterprises; it is rather certain though that any promise of unusual profits should be viewed with suspicion. More than likely such promotions are unsound or at least questionable.

A typical blue-sky promotion was that of the Pan Motor Company; its flamboyant circulars and advertisements covered the Middle-Western states. Advertisements in newspapers compared Samuel C. Pandolfo, the promoter, to "the born captains of the world of industry" and proclaimed that "It was this inherent genius that gave the world Charles Schwab, Thomas Edison, and Cyrus McCormick" and "It was the same inexplicable influence that produced S. C. Pandolfo." The advertising of the company gave an illustration of a motor car to sell at $1,000. Such a car as announced never existed. The company's advertising created the impression that mass production was soon to start, yet in two years less than 300 cars were produced. Post office inspectors became interested and as a result Pandolfo was found guilty and was sentenced to ten years in prison.[3]

Half-truths, or statements although true on the surface which hold back material facts or qualifications, characterize the fraudulent advertisement. Typical statements are: (1) the representation that a certain company has paid $6 cash dividends for a number of years when in fact over this identical period the company has lost money; for promotional purposes the dividend may have been paid out of capital; (2) a statement that the net assets are $60 a share when in fact they would not be nearly that amount if a contingent liability, such as a claim for

[2] Flynn, John T., Investment Trusts Gone Wrong, pp. 108–112.

[3] For an account of this fraud, see H. J. Kenner, The Fight for Truth in Advertising, pp. 73–77; Pandolfo v. U. S., 286 F. 8 (C.C.A.Ill.1922), cert. denied 261 U.S. 621, 43 S.Ct. 433, 67 L.Ed. 831 (1923).

patent infringement, were paid; (3) a statement that sales have been $5,000,000, when in fact a large part of the sales were made to subsidiary companies which had not made sales to the public.[4]

The chronicler of this period however should not comment too harshly upon the ethics of the period without having due regard for the *mores* and customs of the time. Any period must be judged in the light of the customs and philosophies of that particular day.

Publishers in the early years of the present century began to see that if unreliable advertising copy were accepted for publication results prejudicial to the press would ensue. Readers would begin to lose faith in the advertising of unreliable advertisers; all associated advertising would tend to be judged unreliable. Efforts were instituted accordingly to effectuate a higher ethical plane for advertising copy.

Early in the twentieth century various magazines and newspapers used their pages to campaign against various frauds and fraud promoters who were using advertising to ensnare new prospects. Mark Sullivan exposed certain medical fakes and frauds in the *Ladies Home Journal* in 1904; Samuel Hopkins Adams in 1909 and 1910 published in *Collier's* a series of articles on "The Great American Fraud" in which he laid bare the truth regarding medical nostrums and healing quackery. The *Delineator, Dry Goods Economist, World's Work, Financial World,* and *Ladies Home Journal* were other publications which exposed various fraudulent practices. Newspapers including the *Chicago Tribune, Philadelphia North American, New Orleans Item, New York Tribune, New York Times, New York Sun, New York Globe, St. Louis Star, Seattle Post-Intelligencer, Cleveland Press* and *Cleveland News and Leader* campaigned against advertising and promotional chicaneries.[5]

Three years before the passage of the Federal Pure Food and Drugs Act in 1906, the *Cleveland Press* and other Scripps-McRae papers established an advertising censorship, which cost the group approximately $500,000 in advertising revenue in one year.[6]

[4] Meyer, C. H., The Securities Exchange Act of 1934, p. 75.

[5] Kenner, H. J., The Fight for Truth in Advertising (1936), pp. 13–14. Lee, A. M., The Daily Newspaper in America (1937), p. 328.

[6] McRae, M. A., Forty Years in Newspaperdom (1924), pp. 213–214.

Prior to 1910, the *New York Times* instituted its *Index Expurgatorius*. In 1914, the *New York Tribune* announced its policy of better advertising standards and offered to refund any reader's money if he were dissatisfied with goods advertised in that paper. Its Bureau of Investigation read copy submitted and checked on the character of advertisers not known to the office.

§ 82. PUBLISHERS INSTITUTE CENSORSHIP

Leading newspapers have evolved definite regulations to enforce higher business standards.

Publishers need to be interested in the legal status of advertising. They are responsible for their own advertising, and in case of knowledge of fraudulent advertising of their advertisers the publishers may be held responsible as well as the advertisers. Too, the newspaper advertising department often virtually becomes a type of advertising agency, so far as service is concerned; in this capacity the advertising staff has opportunity to give counsel and technical advice.

It is clear that publishers are not liable to the individual for fraudulent advertising that causes financial loss or other damage, unless the publisher *knew* that such advertising was fraudulent or otherwise likely to cause damage. The absence of liability for damage does not mean that there is an absence of responsibility to the public generally and to the particular reader of the publication.

The newspaper that permits dishonest or fraudulent advertising hurts its own standing with its readers and lessens the faith of both the reader and the advertiser in the columns of such a newspaper. Publishers, in addition to psychological and economic reasons for refusing dishonest advertising, tricky advertising, or advertising that is likely to misrepresent, are more and more cognizant that they have not only a moral duty to the public, as well as to their paper and its readers and advertisers, but also a sound business obligation to present through their columns honest and reliable advertising.

The *St. Louis Post-Dispatch* has done outstanding work in developing advertising censorship. The general principles guiding the *Post-Dispatch* in effecting enforcement of censorship regulations for advertising are to deny space for any advertisement (1) which constitutes an apparent attempt to cause financial loss to readers directly or indirectly, (2) which might cause an

injury to health or morals, (3) which evades or attempts to evade or violate any law, (4) which criticizes or attacks directly or by implication any individual, race, religion, organization, institution, business, or profession. Further, the classified advertising regulations do not permit any misclassification of advertisements, or any advertisements which might destroy the confidence of either readers or advertisers in classified advertising. Classified advertising possesses the possibility of attracting a far greater number of possible advertisers than does display advertising; with this possibility goes greater responsibility for regulation.

The *Post-Dispatch* specifies the following rules for want advertising:

> Types of classified advertisements which have generally been found, through experience, to be objectionable:
> 1. Offers to sell partnerships or interests in businesses that have no tangible or physical value.
> 2. Advertisements requesting money for formulas, technical advice, instruction or other information, except when coming from thoroughly reliable sources.
> 3. Requests for money for samples, except when made by responsible concerns, or when samples have a genuine value.
> 4. Free offers which may mislead readers.
> 5. Advertisements from psychics, fortune tellers, palmists, clairvoyants, astrologists, etc.
> 6. Advertisements that may be construed to be indecent, immoral, obscene, vulgar, suggestive or offensive.
> 7. Advertisements that attack or cast reflections directly or indirectly on competitive merchandise.
> 8. Offers of "home work" unless by concerns of established responsibility.
> 9. Investment offers which are highly speculative or offer exaggerated, or unreasonable returns on money invested, such as partnerships, businesses, interests in businesses, oil and mining lands or stocks, lots in real estate developments of unestablished value, distributorships, formulas, etc.
> 10. Offers of government or civil service positions when those making offers have no authority from the government.
> 11. Advertisements from dealers in furniture, furs, clothing, or other merchandise, which make it appear to be sales by private parties or owners.
> 12. Advertisements that encourage or tend to encourage bankruptcy or divorce.
> 13. Offers to secure or to sell mailing lists or names for mailing lists, unless made by established and responsible concerns.

14. Advertisements of correspondence courses leading to positions as detectives, for railroad positions, foreign shipping and trade, postal, secret service, civil service, etc., unless placed by competent and established schools.
15. School advertisements that offer "pay while learning," especially when such schools are "out of town."
16. Advertisements that are intended as jokes.
17. Matrimonial, massage or offers of similar nature.
18. Advertisements pertaining to lotteries, drawings, euchres, or other games of chance.
19. Offers of intoxicating beverages, drugs, narcotics or other stimulants, or formulas for making.
20. Offers of medicine, medical appliances or treatment when claims for same either directly or indirectly are not justified by facts or common experience.
21. Advertisements for numerous employes, unless the number of positions to be filled justify the copy.
22. Advertisements that offer, or appear to offer, employment on a salary basis when the remuneration is on a commission basis.
23. Advertisements offering employment on a commission basis should clearly state this fact. In this connection the following qualifications may be valuable.
 a. "SALARY"—is a definite amount to be paid each week to an employee regardless of the volume of work or the number of sales made during the period of employment.
 b. "DRAWING ACCOUNT"—is a stipulated amount paid to salesmen irrespective of the number of sales made. It may be deducted from subsequent commissions.
 c. "COMMISSION"—Whenever the amount paid depends on the volume of sales made, the basis of compensation must be stated as "Commission."
 d. "Salary and Bonus"—"Drawing Account Bonus"—"Commission and Bonus" are permissible.
24. Help wanted advertisements for girls or minors to go out of town must be thoroughly investigated.
25. Exaggerated statements of possible earnings in Salesmen Wanted advertisements such as "Earn $20,000 a year" are not acceptable.
26. Advertisements offering railroad tickets for sale.
27. Advertisements in any Help Wanted classification that call for an expenditure of money on the part of the respondents, such as courses and instruction, with or without promise of future remuneration.
28. Offers to train persons for theatrical or motion picture work must be accepted from only reputable theatrical agents or producers.
29. Advertisements requiring an investment of any amount are not accepted under the Help Wanted Classifications.

30. Advertisements for women to travel, pose, or work as demonstrators, models, etc., are not accepted until the reliability of the advertiser is established.
31. Offers of employment where there are strike conditions or later trouble must so state.
32. "Free Lot" offers or schemes.
33. Use of "leaving the city," "account of death in family," etc., to indicate apparent sacrifice in offers of real estate, furniture, furs, clothing or other merchandise, when such statements are not bona fide.
34. Advertisements for the boarding of children, caring for invalids, etc., are only accepted from such places as have complied with municipal regulations. Those who have no license should be referred to Room 35, Municipal Courts Building.
35. Advertisements of the dissolution of partnership must be signed by all the members composing the partnership. The advertisers must satisfy us as to their identity.
36. Advertisements announcing births, engagements or marriages must be verified.
37. Advertisements for roommates must state that the roommate be of the same sex as the advertiser.
38. Advertisements of rooms to rent must not contain such phrases as "lady living alone," "widow," "bachelor," "actress," where the word "privileges" is mentioned; the copy must define the privileges.
39. Advertisements offering to start anyone in the mail order business, to furnish or sell mail-order plans or secrets, or a course in the mail-order business, are not accepted.
40. Advertisements for songs where the advertiser charges a few dollars for setting to music, printing, etc., are not accepted.
41. Advertisements offering mining stocks, oil lands leases, or royalties, are not accepted unless thoroughly investigated and found bona fide.

The Post-Dispatch reserves the right to make additional regulations covering other advertisements which it may consider unacceptable.

Illustrations of types of *Post-Dispatch* rejections of advertising, as cited by L. E. Pritchard, chairman of the Advertising Censorship Board of the *St. Louis Post-Dispatch,* are:

A defatted chocolate-flavored drink was offered with claims of having 100 per cent more energy value than ordinary beverages.

A 40,000-line schedule for a yeast product to add pounds of weight.

A yeast product making or implying the claims that there existed a vitamin shortage in the average daily diet of the

nation and this brand of yeast could satisfy the need, but giving no convincing evidence that such a shortage existed or that this yeast would make children grow, insure freedom from misformed teeth or dental diseases, or act as a cold preventive.

A yeast campaign for complexion troubles rejected because medical science does not recognize yeast as an adequate treatment for acne, furunculosis, and other skin affectations popularly referred to as pimples.

A pain reliever for women containing amidopyrine, because of the dangerous nature of that drug and because the conditions for which it was recommended might offend some readers.

A gasoline gadget claiming to increase mileage to 66 miles per gallon and offering territories for sale.

An eyelash and eyebrow darkener consisting of silver nitrate and pyrogallol rejected because of the possible injury to the eyes that might result to the user.

Advertisements for magazines with candid camera pictures that are too candid.

Medical sanitariums not recognized as ethical.

A hair preparation claiming to grow hair.

A depilatory containing a dangerous ingredient.

The *Chicago Daily News,* in expressing its policies on advertising, ran the following editorial:

WHY WE SAID "KILL IT"

Freedom of the press includes the right of a newspaper to reject advertising offered to it for publication. It is as important to defend the purses and health of the people from private exploiters as to defend their liberties against political usurpers.

Newspaper men with a proper sense of their mission, therefore hail the recent decision in which Judge Clyde I. Webster of Detroit reaffirmed the right of newspapers to reject advertising. He found ample precedents in the rulings of other courts where attempts to force advertising upon newspapers had been held illegal.

The Daily News has resisted every overt and covert attempt to deprive the people of their right to that uncensored news which alone can assure their rights as American citizens. Our readers are more or less familiar with that fight.

In the same period The Daily News has fought no less strenuously and as successfully against attempts to deprive the people of their money and their health.

The advertising of stocks, bonds and other financial offerings is rejected by The Daily News, unless the securities of-

fered are those of sound, legitimate concerns that can meet far higher requirements than are laid down in the Illinois blue sky law.

The Daily News closes its columns against all advertisements of alcoholic liquor. It laid down that policy before repeal of the eighteenth amendment, when it was generally presumed that legal liquors offered for sale would at least be potable in the generally accepted sense. Naturally The Daily News is gratified beyond expectation that its policy now has added vindication, because of the fact that most of the distilled liquors, and many of the wines advertised and offered for sale in Chicago, have turned out to be of inferior quality, some undoubtedly dangerous to health. The Daily News is the only newspaper in Chicago that does not accept the advertising of beers or malt liquors.

The principle of The Daily News rule that bars liquor advertising extends to all medical advertising. In the last year, more than $500,000 has been paid to other publications in Chicago by advertisers of liquor and of medicines that are either fraudulent in their claims, or are deemed to be potentially dangerous to health.[7]

The *New York Times'* policies in regard to the censorship of advertising are as follows:

The New York Times endeavors to exclude misleading, inaccurate and fraudulent advertisements and unfair competitive statements in advertising. The chief purpose of The Times censorship is to protect the reader.

The Times Advertising Index Expurgatorius, which follows, lists a number of classes of advertisements which The Times will not accept. In addition, there are statements in other classes of advertising which The Times will not accept, as, for example, the claim that any cosmetic will cure wrinkles or banish freckles; advertisements of schools which make unwarranted promises of employment; advertisements of mail study courses which claim that their instruction is equivalent to attendance at school or college, etc.

The purpose of The Times censorship is two-fold. The Times does not accept any advertising whatsoever of a firm which it believes to be of undesirable character. The Times also watches the advertisements of firms which are acceptable to see that the copy conforms to its regulations concerning misleading statements, unfair comparative statements, etc.

The text of every advertisement ordered for insertion in The Times is read first by the Publication Office staff, or in the case of Classified Advertising by the copy passers in that department. In addition, practically every display advertise-

[7] Chicago Daily News, July 31, 1934.

ment is read by the staff of the Advertising Censorship Department. When statements are discovered which the Censorship Department believes ought to be changed, the corrections are taken up with the advertiser or the agency by the representative of the Advertising Department who is covering the account, or occasionally, if it seems advisable, the Censorship Department itself gets in touch with the advertiser.

Investigations are frequently made by the Advertising Censorship Department to develop further information or to determine the accuracy of statements. The recognized agencies of investigation, such as the Better Business Bureau, are consulted and frequently are asked to shop an advertisement.

In many classifications advertisers in The Times must fill out questionnaires. These classifications are: Financial, which has one questionnaire for securities dealers, one for advisory services, and one covering partnerships, investments, distributorships, etc.; Business Opportunities; Literary Services; Seeds and Nurseries; and Real Estate Mortgages.

In the case of financial advertising all announcements are first submitted to the Financial Advertising Department for a written vote of the members of its staff and are then acted upon by the Censorship Department. All advertisers must fill out questionnaires and The Times also obtains reports from commercial agencies.

In the case of medical advertising The Times will not accept any announcement until it has in its files the opinions of its own medical department and the recognized local and national medical bureaus of information. A special set of regulations governing medical advertising may be obtained from the Censorship Department.

If any firm makes inaccurate or misleading statements in its advertising and refuses to correct them, the advertising is declined. Further, if The Times receives complaints from its readers which, upon investigation, convince the Censorship Department that the business practices of the firm are unfair or open to question, The Times declines further announcements of the firm.

Another function of censorship is to pass upon those questions which cannot be set forth in a code of rules but which have to do with advertising which may be offensive to persons of good taste. The Times frequently makes changes in copy and illustrations in advertisements which are distasteful or salacious.

RETAIL ADVERTISING

A special set of regulations applies to retail advertising to govern comparative statements referring to competitors or making claims of underselling. The rules in this classification are as follows:

1. GENERAL STATEMENTS
 Untrue, deceptive or misleading statements or illustrations are not acceptable.
2. COMPETITIVE CLAIMS WHICH REFER TO QUALITY OR PRICE
 A. Statements or representations which refer to the goods, price, service or advertising of any competitor are not acceptable.
 B. Statements which claim to undersell competitors are not acceptable.
3. COMPETITIVE CLAIMS ON POLICY OR BUSINESS METHODS
 A. Statements which make or imply comparisons must confine those comparisons to the individual advertiser's own merchandise, services, prices or business methods.
 B. Statements of fact, if generally known, and susceptible of definite proof are acceptable.
4. "BAIT" OFFERS
 "Bait" offers of merchandise wherein the customer is denied a fair opportunity to purchase, are not acceptable.

Some examples follow of expressions in advertisements which are not acceptable and the changes required to make them acceptable:

Not Acceptable	Acceptable as Revised
The lowest price ever offered	The lowest price we ever offered
The best buy in town	One of the best buys in town
Will surpass anything you could possibly find	Will surpass anything we could possibly offer
Unrivaled in fine quality	Unexcelled in fine quality
Unprecedented quality	Exceptional quality
Unheard of prices	Amazingly low prices
The finest coat we have ever seen	The finest coat we have ever sold
We give you the most for your dollar	We give you exceptional value for your dollar
Superior to any you've seen at this price	Superior to what you'd expect to find at this price
The outstanding value in men's footwear	An outstanding value in men's footwear
We believe you will find these values greater than elsewhere	We believe you will find these values unsurpassed

THE NEW YORK TIMES

ADVERTISING INDEX EXPURGATORIUS

1. Fraudulent or doubtful advertisements.
2. Offers of something of value for nothing; advertisements that make false, unwarranted or exaggerated claims.
3. Advertisements that are ambiguous in wording and which may mislead.
4. Attacks of a personal character; advertisements that make uncalled-for reflections on competitors or their goods.
5. Advertisements holding out the prospect of large guaranteed dividends or excessive profits.
6. Bucket shops and offerings of undesirable firms.
7. Advertisements that are indecent, vulgar, suggestive, repulsive or offensive.
8. Matrimonial offers.
9. Objectionable medical advertising of products containing habit-forming or dangerous drugs; offers of free medical treatment; advertising that makes remedial, relief or curative claims (either directly or by inference) not justified by the facts or common experience.
10. Offers of homework.
11. Mailing lists offered for sale.
12. Advertisements of preparations to "grow new hair".
13. Advertisements of fortune telling, dream interpretations, individual horoscopes and nativity writings.
14. Any other advertising that may cause money loss to the reader, or injury in health or morals, or loss of confidence in reputable advertising and honorable business, or which is regarded by The New York Times as unworthy.

The New York Times welcomes information from readers as an aid to its efforts to keep its advertising columns clean. The Times will pay a reward of $100 to anyone causing the arrest and conviction of a person or firm obtaining money under false pretenses through fraudulent advertising published in its columns.

REGULATIONS GOVERNING THE ACCEPTABILITY OF MEDICAL ADVERTISING BY THE NEW YORK TIMES

If the advertising of any preparation which advertises medication or treatment is offered, The Times will ask the opinion of its own Medical Department and the recognized local and national medical bureaus of information.

No advertising will be accepted unless we have information in our files from all these sources.

These medical authorities will not exercise censorship over The New York Times columns. The Times will apply to the information the judgment of intelligent laymen.

The Times will not accept the advertising of any preparation which might lead to self-diagnosis or self-medication of any serious condition or illness.

The advertising, even of acceptable preparations, will be carefully censored.

The Times will not accept medical advertising which contains testimonials. It will censor any copy which goes too far in indicating that doctors "prescribe" or recommend any preparation for a stated illness or condition.

The Times will not accept the advertising of radio programs of non-acceptable medical preparations.

The Times will not accept the advertising of preparations which may be harmless in themselves but which either in their newspaper advertising copy or on their labels or in their descriptive pamphlets make grossly unwarranted claims.

The *Milwaukee Journal,* which does a conscientious job in maintaining a high standard of advertising, believes that the regulation of advertising is a continuing problem, necessitating constant vigilance and the adoption of new regulations or the modification of old regulations as a particular case demands. The *Journal,* in reviewing its own advertising policy, holds that the mere elimination of certain specified phrases or terms is of doubtful value, for any willful advertiser can circumvent such restrictions. Its experience indicates that some sound general rules are necessary, rather than a list of "do's and don't's," blindly enforced. Used car advertising is particularly susceptible to abuses, which may often be due to a misconception of the sound purpose of advertising and to a misconception of the type of advertising best suited for sale stimulation. The general rules in this class of advertising adopted by the *Journal* are as follows:

1. All statements and claims shall be accurate and truthful in every detail.
2. Advertised cars must be available for sale and willingly sold at the price and terms quoted.
3. No advertisements shall directly or indirectly reflect upon the honesty, integrity or trustworthiness of any other advertiser or automobile dealer.
4. Advertising of automobiles by dealers or agents for dealers, from a residence address, shall make clear that they are not private parties.
5. Price or payment figures appearing in used car copy shall be accurate, clear and free from deception. If monthly payments are quoted, the advertisement shall state the exact amount per month.

6. Automobiles which have been wrecked, used as taxi cabs or squad cars, or are not in running condition, shall be so described in advertising.
7. If a car is advertised as "guaranteed," the purchaser shall be provided with a written document stating the terms of the guarantee.
8. Demonstrators, officials' cars, etc. may be so advertised only by an authorized dealer in the make of car offered and then only when the cars have been used as such.
9. Advertising offering "will you take" or similarly described allowances, shall not be used unless bona fide and unless the new car on which the offer applies is fully described as to year and model.
10. Violations of these standards or false, untruthful or misleading advertising of any kind will call for the publication of a "correction" in the medium which carried the original inaccuracy.

To avoid deception in "help wanted" advertising copy, the *Milwaukee Journal* has instituted some definite principles for the benefit of the persons to be served by this type of advertising and for the strengthening of advertising standards as they reflect the ethics and effectiveness of advertising. In classified advertising of this type, when there is no supervision, copy may not be used that leads to false hopes on the part of the reader, that gives insufficient information, or that deliberately deceives. The basis of the remuneration must be clear, that is, whether the basis of payment is salary, commission, or drawing account. Want ads for help are rejected when they magnify the possible financial return to the prospect; so-called "come on" copy may not be used.

Examination of classified advertising over a period of years will show that some papers have not had proper supervision of help wanted copy. Exaggerated statements have been used; jobs have been advertised which have required some investment in materials, kits, and capital funds.

To avoid the aforementioned evils, the *Milwaukee Journal* requires that each help wanted advertisement must state in the index word or in the copy exactly the type of work to be done. "Help wanted, apply Monday" would not be acceptable; neither would "Beauty operator wanted" when the real job advertised is for a person with beauty parlor experience to sell cosmetics. The basis of the remuneration must also be stated; there must be no exaggerated statements. A statement like "Tom Jones earned $50 last Saturday afternoon" will not be permitted unless it is an exceptional case and unless the advertiser has furnished acceptable proof.

Cash bond copy must not be run under "Help Wanted" but must be listed in the *Milwaukee Journal* as "Help Wanted with Investment." Help wanted copy requiring a small deposit on sample merchandise or a small purchase of merchandise to be resold must be classified under "Agents & Solicitors." It must be clearly shown whether the work is to be house-to-house canvassing, door-to-door selling, selling to housewives through personal calls, or direct selling to housewives.

Advertising of coal and coke which quotes a price must specify the kind and size of fuel to which the advertising applies. When mixes or blends are advertised, the copy must specify the proportions, kinds, and sizes of each fuel contained in the blend.

As advertising gains in potential pulling power through circulation, the improvement in the ethics and practice of circulation standards and methods reflects higher standards in advertising, particularly in the newspaper and periodical fields. The daily and weekly press both have realized the importance of audited circulation. The formation of the Audit Bureau of Circulations in 1913 was a long step in effecting an economically sound and ethically strong measurement of circulation as a base for newspaper and magazine advertising. This association has proved a forward movement for business honesty in circulation; it is an indication of a higher ethical standard for the publishing business. Its importance is monumental, for circulation is the coefficient of advertising effectiveness. Honest advertising has been immeasurably strengthened, though indirectly, through honest circulation. It is still possible for an advertisement inherently fraudulent and dishonest to be honestly circulated. High circulation norms and policies do not necessarily indicate that what is advertised is advertised honestly; the very fact that the publishing business is cognizant of the advantages of honest advertising policies is indicative of the trend toward ethical standards in phases of publishing other than circulation.

Maintenance of high business standards, which emphasize the necessity for the enforcement of these standards in advertising, is an outstanding principle of the Associated Business Papers, Inc., an organization of approximately 150 leading business and technical magazines of the United States. Membership in this group is predicated upon the membership in the Audit Bureau of Circulations and the following requirements for each publication:

1. Its advertising columns must be open to all reputable advertisers in its field furnishing copy acceptable to the publisher.

2. It must not be owned directly or indirectly by any trade, class, or professional association.
3. It must not be an organ or mouthpiece of any house or combination of houses to further its or their special interest as against the joint interest of the trade or class.

Each member of the Associated Business Papers, Inc., further, subscribes to the following principles of publication practice:

1. To consider, first, the interest of the subscriber.
2. To subscribe to and work for truth and honesty in all departments.
3. To eliminate, in so far as possible, his personal opinions from his news columns, but to be a leader of thought in his editorial columns and to make his criticisms constructive.
4. To refuse to publish "puffs," free reading notices or paid "writeups"; to keep his reading columns independent of advertising considerations, and to measure all news by this standard: "Is it real news?"
5. To decline any advertisement which has a tendency to mislead or which does not conform to business integrity.
6. To solicit subscriptions and advertising solely upon the merits of the publication.
7. To supply advertisers with full information regarding character and extent of circulation, including detailed circulation statements, subject to proper and authentic verification.
8. To co-operate with all organizations and individuals engaged in creative advertising work.
9. To avoid unfair competition.
10. To determine what is the highest and largest function of the field which he serves, and then to strive in every legitimate way to promote that function.

The American Association of Advertising Agencies has in force the following code of practice relative to advertising copy:

It is unsound and unprofessional for the advertising agency to prepare or handle any advertising of an untruthful or indecent character, as exemplified by the following copy practices disapproved in a code jointly adopted by the American Association of Advertising Agencies and the Association of National Advertisers, and also by the Advertising Federation of America:

1. False statements or misleading exaggerations.
2. Indirect misrepresentation of a product, or service, through distortion of details, or of their true perspective, either editorially or pictorially.
3. Statements or suggestions offensive to public decency.

4. Statements which tend to undermine an industry by attributing to its products, generally, faults and weaknesses true only of a few.
5. Price claims that are misleading.
6. Pseudo-scientific advertising, including claims insufficiently supported by acceptable authority, or that distort the true meaning or practicable application of a statement made by professional or scientific authority.
7. Testimonials which do not reflect the real choice of a competent witness.[8]

§ 83. THE PRINTERS' INK STATUTE

Twenty-five states have adopted the model statute to make fraudulent and misleading advertising a misdemeanor.

The Associated Advertising Clubs of the World, in 1907, endorsed a movement to stop fraudulent and misleading advertising. Printers' Ink, in 1911, advocated the adoption of a model statute, which would make false advertising a misdemeanor. Leaders in the advertising and publishing world recognized that it was difficult to secure prosecutions for false advertising under the usual state fraud statute. Considerable initiative was developed through the Better Business Bureau and various advertising clubs.

The model statute does not make *scienter*, knowledge, or intent an element in the offense. The offense is committed irrespective of intent, under the provisions of this statute, which follows:

> Any person, firm, corporation or association who, with intent to sell or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or any-

[8] Revised statement adopted by the American Association of Advertising Agencies, April 29, 1937.

thing so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of misdemeanor.

Gradually, the concept of responsibility for advertising has been accepted by publishers, at least to the extent that the publishers regard advertising as a liability as well as an asset. In accepting advertising the publisher takes the liability that the mere presence of certain advertising in his columns affects the reputation of his paper for good or evil.

There are six states which have no such fraudulent advertising statute, namely, Arkansas, Delaware, Georgia, Maine, Mississippi, and New Mexico. Twenty-five states have what Printers' Ink considers the model statute or a satisfactory modification of that statute. These states are Alabama,[9] Colorado,[10] Idaho,[11] Illinois,[12] Indiana,[13] Iowa,[14] Kansas,[15] Kentucky,[16] Lousiana,[17] Michigan,[18] Minnesota,[19] Missouri,[20] Nebraska,[21] Nevada,[22] New Jersey,[23] New York,[24] North Dakota,[25] Ohio,[26] Oklahoma,[27] Oregon,[28] Rhode Island,[29] Virginia,[30] Washington,[31] Wisconsin,[32] and Wyoming.[33] The remaining seventeen states have some modified form of the statute or an advertising law that is not so inclusive as the statute. This group includes Ari-

[9] Code of Ala. 1940, Tit. 14, § 211.

[10] Colo.Stat.1935, vol. 2, c. 48, § 317.

[11] Idaho Code 1932, § 178-3915.

[12] Ill.Rev.Stat.1943, c. 38, § 249a.

[13] Ind.Stat.Baldwin's Ann.1934, § 2754.

[14] Code of Iowa 1939, § 13069.

[15] Kansas Gen.Stat.1935, § 21-1112 et seq.

[16] Ky.Rev.Stat.1942, 434.270.

[17] La.Crim.Stats. Dart, 1932, art. 966.

[18] Mich.Comp.Laws, Supp. Mason's, 1940 § 17.1115-33.

[19] Minn.Stat.1941, § 620.52.

[20] Mo.Rev.Stat.Ann. § 4698.

[21] Neb.Comp.St.1929, § 28-1235.

[22] Nev.Comp.Laws 1929, § 10529.

[23] N.J.S.A. 2:107–1.

[24] N.Y.Penal Law §§ 421, 421-a, 421-b (listed in McKinney's Consolidated Laws of New York, 1938, c. 40, Bk. 39; also in Thompson's Laws of New York (1942).

[25] N.D.Comp.Laws 1913, § 9989.

[26] Ohio Gen.Code, Page's 1939, § 13194 [13193-2].

[27] Okla.Stat.1941, Tit. 21, § 1502.

[28] Or.Comp.Laws Ann.1939, Vol. 3, § 23-1303.

[29] Gen.Laws of R.I.1938, Chap. 612, § 54.

[30] Va.Code 1942, § 4465a.

[31] Wash.Rev.Stat. Remington, 1932, § 2622—1.

[32] Wis.Stat.1941, § 100.18.

[33] Wyo.Rev.Stat.1931, § 32-905.

zona,[34] California,[35] Connecticut,[36] Florida,[37] Maryland,[38] Montana,[39] Massachusetts,[40] North Carolina,[41] New Hampshire,[42] Pennsylvania,[43] South Carolina,[44] South Dakota,[45] Tennessee,[46] Texas,[47] Utah,[48] Vermont,[49] and West Virginia.[50] Legislation against fraudulent advertising in the District of Columbia falls in the latter group.[51]

The advantage of the model Printers' Ink statute or a satisfactory modification thereof is that conviction should be more easily obtained than under the common law action of fraud. In order to establish fraud under the common law rule there must be proved several definite elements, namely a representation regarding a material fact, the intention to influence the plaintiff's conduct, reliance of the plaintiff on the representation in reacting according to the purpose desired, knowledge that the representation was false or recklessly made without determining its truth or falsity, and damage sustained as a consequence of the representation so made.

The model statute was upheld by the Appellate Court of Ohio in State v. Schaengold in 1915.[52] This case is especially interesting because Ohio was one of the first states to pass the model statute and because this case was an early adjudication of the model form of this statutory protection against false and misleading advertising.

The statute must be strictly interpreted. In State v. Andrew Schoch Grocery Co.,[53] a conviction was obtained on the ground of fraudulent advertising, but when the case went to the state supreme court the decision was reversed. The defendant had advertised that his meat cutters received a minimum wage of $25 a week, when in fact six of his meat cutters received $25 a

[34] Ariz.Code 1939, § 43-2620.

[35] Cal.Gen.Laws 1937, Act 6758.

[36] Conn.Gen.Stat.1930, § 6343.

[37] Fla.Stat.Ann. § 817.06.

[38] Annotated Code of Md.1939, art. 27, § 207.

[39] Mont.Rev.Code 1935, § 11423.

[40] Mass.Gen.Law 1932, c. 266, § 91.

[41] N.C.Code 1939, § 4290.

[42] N.H.Rev.Law 1942, c. 450, § 9.

[43] Pa.Stat.Purdon, tit. 18, §§ 4857, 4858.

[44] S.C.Code 1942, § 1379.

[45] S.D.Code 1939, § 13.4201.

[46] Tenn.Code Michie's, 1938, § 11154.

[47] Tex.Penal Code, Vernon, art. 1554.

[48] Utah Rev.Stat.1933, 103—4—1.

[49] Vt.Pub.Law 1933, § 8463.

[50] W.Va.Code 1937, § 5979.

[51] D.C.Code 1941, § 22—1411.

[52] 13 Ohio Law Reporter 130 (1915).

week and two others received $20 a week. Investigation disclosed that the two men who received less than the advertised minimum wage were merely counter men, not skilled in meat cutting. In this case the supreme court determined that there was no violation of the statute.

The model statute on fraudulent advertising sets no standards for determining what is false and misleading. In a Florida case, the advertisement on which the prosecution was based stated:

ANY SUIT IN THE STORE!

Values to $55.00!

$15.00

In reversing the trial court's conviction of the defendant, the court pointed out that the ordinance covered only advertising which "falsely or fraudulently conveys, or is intended to convey, the meaning that the thing so advertised had greater value or is intrinsically worth more, or previously sold for in Miami at a greater price, than the price so presently advertised." [54]

Any advertising that does not come within the purview of the statute as strictly interpreted cannot be the basis of conviction of the false advertising law. In People v. Nessler,[55] the conviction was reversed on the ground that the defendant in his advertising in question did not make any statement, assertion, or representation of fact concerning any merchandise or service which he offered to the public; rather the advertising, if the basis of any action, the court noted, would have to be such as constituted unfair competition.

In State v. Wohlmouth [56] the defendant was convicted for fraudulent advertising, but the decision was reversed because there was no representation of any good offered for sale; the

[53] 193 Minn. 91, 257 N.W. 810 (1934).

[54] McCreary v. Cohen, 108 Fla. 421, 149 So. 208, 211, 89 A.L.R. 1001 (1933).

[55] 198 App.Div. 362, 190 N.Y.S. 506 (1921).

[56] 78 W.Va. 404, 89 S.E. 7 (1916).

advertising merely mentioned that a palm beach suit would be given away with every regular suit sold. The indictment did not aver the actual sale of a suit to a designated person, or a refusal to give away a palm beach suit as specified.

The false advertising statute in Massachusetts specifies that the defendant to be guilty must know or might on reasonable investigation have ascertained that an advertisement is untrue, deceptive, or misleading. The constitutionality of this statute was tested in Commonwealth v. Reilly [57] in which the conviction was affirmed; the court held that the statute was sufficiently definite and that there was a fixed and ascertainable basis of determining guilt.

When the defendant in State v. Rubin,[58] operating as the Chain Silk Stores, advertised a silk fabric at $3.95 per yard under the brand name of Marvella, manufactured solely by the Forstmann & Huffmann Co. of Passaic, New Jersey, he was convicted of a misdemeanor for inserting a false advertisement. The fabric was in fact not Marvella.

In State v. Krasne,[59] the statute on fraudulent advertising was upheld. The defendant had advertised "$1.00 B.V.D. Union suits, now 49¢" but upon inquiry for this article of merchandise it was found that the goods were not the nationally known brand, B. V.D. The trial court sustained a demurrer to the evidence, but the supreme court reversed the decision, holding that the advertisement was false and misleading, and came within the model statute.

What is misleading, deceptive, and untrue is not defined in the model statute or other statutes of this nature, but the problem of determining is left for the jury to decide as a question of fact. In State v. Massey [60] the defendant used the following advertisement:

Pre-opening Sale of Used Pianos

These pianos must be closed out to make room for carload of new pianos coming from the east. Every piano fully guaranteed two years; exchange privilege; unheard of easy terms. All look like new.

Smith & Barney, oak case, was $400; now $200.

Schilling & Sons, beautiful case, was $375; now $167.

[57] 248 Mass. 1, 142 N.E. 915 (1924).

[58] 1 N.J.Misc. 506 (1923).

[59] 103 Neb. 11, 170 N.W. 494 (1918).

[60] 95 Wash. 1, 163 P. 7 (1917).

Brinkerhoff, art case, was $400; now $218.
Free delivery and stool.

J. J. Massey.

It was charged that the Smith & Barnes and the Schilling pianos were never $400 and $375 market values respectively. In the trial court, the defendant was convicted on the ground of fraudulent advertising, but this decision was reversed in the higher court on the ground that the advertisement did not give what the true market values were and that the statements referred to the retail selling price and not to their market values.

It was held in State v. Carruthers,[61] that an advertisement which sought to buy service could not be classed as an advertisement to sell, and so not within the fraudulent advertising statute. The advertisement in question was:

Salesman—$25.00 salary; liberal bonus conditional to start; our men average $12.00 daily repeat sales; steady to those who qualify. 802 Equitable Building.

The complaint in this case was brought by a man who answered the advertisement and began work, but who was not paid according to the terms announced in the advertisement.

§ 84. LIABILITY OF THE ADVERTISER

Advertising generally considered an invitation for an offer; the usual statement in advertising not generally held a warranty, but when the purchaser relies upon advertising statements as to quality and capacity for definite use, such statements may be regarded as warranties.

Liability of an advertiser to the customer who buys the product advertised depends upon several factors, particularly whether the advertisement in question is an offer, or merely an invitation to the prospective advertiser to make an offer, and whether the description of the goods or services is a warranty, a representation, or mere opinion, sales talk, or "puffing." [62]

[61] 21 S.W.2d 895 (Mo.App.1929).

[62] a. Harris v. Rosenberger, 145 F. 449, 458, 13 L.R.A.,N.S., 762 (C.C.A. Mo.1906)—"A purchaser is entitled to receive what he is induced by the vendor's representations to believe he is ordering and paying for, and not something which he does not order and may not want at any price."

b. U. S. v. Staples, 45 F. 195, 198 (D.C.Mich.1890)—"Parties who have anything to sell have the habit of puffing their wares, and we are all familiar with the fact that it is a very prevalent thing in the course of business to exaggerate the merits of goods people have to sell; and within any proper reasonable bounds such

An advertisement is not generally regarded as an offer, but rather as an invitation to the reader to make an offer. If a store in a display advertisement announces a certain type radio at $17.50, giving a picture of the particular radio model and a description of the instrument, two legal questions arise immediately. First, is the advertisement offering that particular type of radio so that anyone who accepts the offer will thereby complete a legal contract? Second, is the description of the radio a legal warranty or guaranty concerning the type and quality of the radio as announced?

An offer must be definite; if an offer is to become the basic element of an enforceable contract, the other elements of a legal contract must be present. A difficult situation would result if every piece of merchandise announced in an advertisement were considered as being offered, for the merchant would be bound legally to supply all comers who "accepted" such an offer; obviously, in many cases, to supply all comers who desired to buy would be impossible, for the merchant might not have on hand sufficient pieces of merchandise of the kind mentioned in the advertisement.

The law deals with possibilities, not with probabilities. In the case of the department store announcing a sale of razors, blouses, or vacuum electric sweepers, there is the possibility that at a given time the demand would be greater than the merchant could supply.

The expression of the prospective purchaser to buy an announced article is merely no more than an answer to the merchant's invitation to open negotiations. The offer to open negotiations on the part of the advertiser is not binding.[63] The statement of a price of an article in an advertisement is a mere announcement of the price at which the merchandise is held and in no way is an offer to sell.[64] The general advertisement in a newspaper for the sale of an indefinite quantity of goods is only an invitation to one or more members of the public to enter into a bargain.[65]

a practice is not criminal. It must amount to more substantial deception in order to be subject to cognizance by the courts. A certain degree of praise and commendation of one's goods in business is allowable; but when that is carried to the extent of obtaining the public's money by means of actually fraudulent representations, then it comes under the condemnation of law."

[63] McLaurin v. Hamer, 165 S.C. 411, 164 S.E. 2 (1932).

[64] Nebraska Seed Co. v. Harsh, 98 Neb. 89, 152 N.W. 310, L.R.A.1915F, 824 (1915).

[65] Lovett v. Frederick Loeser & Co.,

There are however cases in which an advertisement does constitute an offer, for example, an offer of a definite sum for information leading to the arrest of a certain fugitive from justice would become a legal obligation of the party making such offer when another furnished the information as requested.[66]

When a publication offers a specified sum to the person obtaining the highest vote based on paid subscriptions secured, participation in the circulation competition becomes an acceptance of the offer made by the publication and therefore an executory contract between the newspaper or other publication and the person who has accepted the offer.[67]

When an agricultural society advertises for exhibits at a county fair and therein promises prospective exhibitors that the society will provide a sufficient police force to assure protection against loss of the exhibit, an exhibitor who on the strength of the advertisement places an exhibit at the fair thereby completes the contract. Should loss of the exhibit occur when the police protection was inadequate the exhibitor could recover damages.[68] In Carlill v. Carbolic Smoke Ball Co.,[69] the defendant offered a substantial sum to anyone who purchased its smoke ball and used it according to directions if such person contracted influenza. The plaintiff purchased the product and used it for the required period but nevertheless contracted a serious cold or influenza. The court held that the plaintiff could recover the award announced in the advertisement.

The test, whether an advertisement is merely a declaration of intention to negotiate (an invitation to have offers submitted) or a legal offer which becomes a contract upon acceptance, is the determination of the definiteness of the proposition as stated coupled with the expectation that compliance with the terms will incur liability.

To constitute any contract, there must be legally eligible parties, an offer, an acceptance, the correct form, and a consideration, as well as *animus contractus,* or a willingness on the part

124 Misc. 81, 207 N.Y.S. 753 (1924); Ansorge v. Kane, 244 N.Y. 395, 155 N.E. 683 (1927); Georgian Co. v. Bloom, 27 Ga.App. 468, 108 S.E. 813 (1921).

[66] Williams v. Carwardine, 4 B. & A. 621, 110 Eng.Rep. 590; Shuey v. U. S., 92 U.S. 73, 23 L.Ed. 697 (1875).

[67] Mooney v. Daily News Co. of Minneapolis, 116 Minn. 212, 133 N.W. 573, 37 L.R.A.,N.S., 183 (1911).

[68] Vigo Agricultural Society v. Brumfiel, 102 Ind. 146, 1 N.E. 382, 52 Am.Rep. 657 (1885).

[69] (1893) 1 Q.B. 256.

of both parties to make a contract. Obviously, the merchant would have no desire to make such a contract, when he might be swamped with more desires to purchase than he could meet with the goods on hand. There would therefore be no *animus contractus.*

If, for example, a motor boat or an automobile costing $1,800 is advertised, the expression of a customer to purchase, together with his tender of the price, would not close a contract; there could be no legal contract, for under the Statute of Frauds a contract for something costing as much as the price announced would have to be in writing.

Representation and warranty are not identical. A representation is a statement prior to or at the time of making a contract, concerning some fact or circumstance relevant or essential to the contract and leading to the making of the contract. If an advertisement falsely represents, a contract induced by the advertisement may be voidable. A warranty may be either express or implied. According to the Uniform Sales Act,[70] an express warranty is any affirmation of fact or promise by the vendor to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods. No statement as to value or the seller's opinion only is construed as a warranty. An implied warranty is one which the law assumes from the nature of the transaction, such as ownership of the goods, merchantable nature of the goods, and suitability of the goods for the purpose intended. A breach of warranty is the basis of a suit for damages, or might even avoid the contract. Statements in the usual advertisement are not considered warranties.

The purchaser of an article cannot rely on mere dealer's talk or opinion as a warranty. Statements like "the finest on the market," "this should last forever," "there is none better," "this is unsurpassed and moreover is unsurpassable" are typical puffing statements, which cannot be placed on the ground of warranty.[71] An opinion on the quality of the goods sold does not constitute a warranty.[72] Under certain circumstances statements in an advertisement in a newspaper or periodical, or in a circular or a catalogue have been construed as warranties. If

[70] Section 12, Uniform Sales Act.

[71] League Cycle Co. v. Abrahams, 27 Misc. 548, 58 N.Y.S. 306 (1899).

[72] Wilcox Gibbs & Co. v. Henderson, 64 Ala. 535 (1879).

a representation in an advertisement is to be construed as a warranty, it must be evident that such was the understanding between the seller and the buyer; [73] if the representation appears in an advertisement which is considered merely an invitation to others to open negotiations, the representation may be considered to have been so reaffirmed at the time of the sale so as to constitute a warranty. When representations are relied upon by the purchaser as to the quality and capacity of the product for a definite purpose, they may be regarded as warranties.[74] In Baumgartner v. Glesener,[75] an advertisement contained a positive affirmation as to the quality of seed; this affirmation was made for the purpose of influencing the sale of the seed and was relied upon by the purchaser. It was held in this case that there were both express and implied warranties.

Misstatements in an advertisement are evidence of fraud. If an advertisement states that used motor trucks are warranted on the same basis as new motor trucks, and the representation is made that a used truck is a certain type and possesses certain capacities, and the truck is purchased but fails to be as represented, there clearly would be a breach of warranty.

In Meyer v. Packard Cleveland Motor Co.,[76] the court, in holding representations in an advertisement as warranties stated:

> When a man buys a horse, he hardly needs a warranty that it is a horse, or that it is not a mule or a camel though they belong to the same general family of burden bearers.

The determining elements in deciding whether a representation is a warranty include the question whether the product is actually what it is stated to be and whether any statement is understood by both parties as a warranty. A statement that a piano is warranted for five years does not mean that it will stand up against abusive use or that it will remain like new, or that it will not have to be tuned; such a statement does mean that with reasonable treatment it will not give way or wear out within the five year period.[77] If a manufacturer of pianos advertises a piano for sale in the ordinary course of business without disclosure of its having been used or repaired, coupled with statements by the piano salesman, the acts of the manufacturer

[73] Enger & Co. v. Dawley, 62 Vt. 164, 19 A. 478 (1890).

[74] Reiger v. Worth Co., 130 N.C. 268, 41 S.E. 377, 89 Am.St.Rep. 865 (1902).

[75] 171 Minn. 289, 214 N.W. 27 (1927).

[76] 106 Ohio St. 328, 336, 140 N.E. 118, 28 A.L.R. 986 (1922).

[77] Snow v. Schomacker Mfg. Co., 69 Ala. 111, 44 Am.Rep. 509 (1881).

and the words of the salesman may be regarded as an affirmation that the piano is a new instrument, taken out of stock.[78]

The representation in an advertisement may be strengthened by a sample of the product offered in the advertisement to anyone who might request the sample. A sample is a silent, symbolical warranty thoroughly understood and accepted in trade and commerce.[79] When a sample is given there is an implied warranty that the product will correspond in both type and quality.

The general rule is that the manufacturer or distributor is not liable to third parties; the contractual relationship exists between the maker and the direct purchaser of his products. While there might be a warranty to the customer who relies on the manufacturer's representations, there is no such warranty to the consumer when such consumer is not the person who made the purchase. In such a case the consumer is not the person who relied upon the representations of the manufacturer in his advertising or otherwise.

Chysky v. Drake Bro. Co.[80] illustrates the distinction between the customer and the consumer. In this case, the owner of a restaurant purchased certain bakery goods from a baker. The restaurant served these goods. A waitress in the restaurant ate a piece of cake prepared in this bakery; a nail in the cake caused the loss of three of the waitress's teeth. The waitress sued the baker on the ground of breach of warranty. The waitress, it was held, could not recover, for there was no privity of contract between the baker and the waitress or consumer. The court in its opinion stated:

> A manufacturer or seller of food, or other articles of personal property, is not liable to third persons, under an implied warranty, who have no contractual relations with him. The reason for this rule is that privity of contract does not exist between the seller and such third persons, and unless there be privity of contract, there can be no implied warranty. The benefit of a warranty, either express or implied, does not run with a chattel on its resale, and in this respect is unlike a covenant running with the land so as to give a subsequent purchaser a right of action against the original seller on a warranty.[81]

[78] Donovan v. Æolian Co., 270 N.Y. 267, 200 N.E. 815, 104 A.L.R. 546 (1936).

[79] Bradford v. Manly, 13 Mass. 139, 7 Am.Dec. 122 (1816).

[80] 235 N.Y. 468, 139 N.E. 576, 27 A.L.R. 1533 (1923).

[81] 235 N.Y. 468, 472, 473, 139 N.E. 576, 27 A.L.R. 1533.

The foregoing case illustrates an attempt to gain relief on the ground of warranty, which naturally implies a contractual relationship. Such relationship did not exist in this case. Relief might have been sought on the basis of tort or on the ground that a manufacturer of a food product owes a duty to the public to produce a merchantable product. The manufacturer of dangerous or poisonous articles is not ordinarily liable to persons with whom he has no contractual relations; if a drug manufacturer, however, negligently labels a jar as containing extract of dandelion when in fact it contained belladonna, he would be liable to a person who used the contents thinking it extract of dandelion.[82] Manufacturers are liable to consumers with whom they have no contractual relations when the manufacturers have been wantonly negligent or fraudulent in the construction or manufacture of a product. MacPherson v. Buick Motor Co.[83] is in point. The plaintiff in this case was injured in a car manufactured by the defendant. The accident was the result of a defective wheel which the defendant manufacturer had purchased from another manufacturer. The wheel, it was shown, was made of defective wood which could have been discovered by reasonable inspection. The defendant did not know of the defect. The court pointed out that an automobile capable of being driven at high speed is a dangerous instrument, and that the manufacturer owed a duty to the persons using the car to inspect thoroughly its component parts even though such parts were not made by the motor car manufacturer. The manufacturer enjoyed an excellent reputation, in large part based on its advertising. In affirming the judgment for the plaintiff, Justice Cardozo stated:

> The defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer. It was not merely a dealer in automobiles. It was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests. * * * The obligation to inspect must vary with the nature of the thing to be inspected. The more probable the danger, the greater the need of caution.[84]

[82] Thomas v. Winchester, 6 N.Y. 397, 57 Am.Dec. 455 (1852).

[83] 217 N.Y. 382, 111 N.E. 1050, L. R.A.1916F, 696, Ann.Cas.1916C, 440 (1916).

[84] MacPherson v. Buick Motor Co., 217 N.Y. 382, 394, 111 N.E. 1050, L. R.A.1916F, 696, Ann.Cas.1916C, 440 (1916).

Negligence in giving directions for the use of inherently dangerous products or negligence in the preparation, manufacture, or fabrication of products has been held to establish the legal liability of the maker. The publication carrying advertisements for such negligently prepared or marked material would not be liable unless the publisher was knowingly a party to the attempted distribution of such material.

§ 85. ADMINISTRATIVE CONTROLS

Through the Post Office Department, the Federal Trade Commission, and the Securities and Exchange Commission, fraudulent advertising which utilizes the mails or becomes active through interstate commerce may be ordered discontinued.

Protection against fraudulent advertising depends upon both state and Federal enforcement of laws. As has already been pointed out earlier in this chapter, prosecution for fraud, under state law has often been difficult because in fraud it is hard to prove intent. The Printers' Ink model statute was intended to overcome the difficulty of proving intent, although this statute was not adopted by all the states.

More facile legal machinery for stopping false and misleading advertising exists in the administrative agencies of the Federal government. Mass distribution of products naturally results from mass production methods, which are so well ingrained in American industry. Mass distribution ordinarily involves widespread sales and promotional efforts, which can hardly exist without the use of the United States mails, or interstate commerce, either of which is a basis for jurisdiction of the Federal government.

The important Federal agencies which may take action against false and misleading advertising coming within their jurisdiction include the Post Office Department, the Securities and Exchange Commission, and the Federal Trade Commission. The Federal Trade Commission enforces the Wheeler-Lea Act regulating advertisements of food, drugs, devices, or cosmetics in newspapers and periodicals, and over the radio.

Lotteries and Fraud

Prosecution for using the mails to defraud includes a wide range of cases, such as advertising fake corporate stock,[85] finan-

[85] Wilson v. U. S., 190 F. 427 (C.C. A.N.Y.1911).

cial schemes impossible of performance,[86] patents,[87] bucket shops,[88] fake marriage bureaus,[89] efforts seeking consignments of goods without any intention to remit,[90] and similar schemes.

Lotteries are denied the privilege of the United States mails. No newspaper or periodical may therefore participate in any scheme which the law regards as a lottery or chance enterprise. Neither may any newspaper or periodical carry an advertisement of any lottery, gift enterprise, or scheme offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of such lottery, gift enterprise, or scheme. Any violation of this provision subjects the offender to a fine of not more than $1,000, or imprisonment of not more than two years, or both; and subsequent violation subjects the offender to an imprisonment of not more than five years.[91]

Under the regulations a publication may not utilize any lottery scheme for promotion purposes either for itself or for one whose interests it promotes by means of advertising. Newspaper stories which promote indirectly or directly a lottery are not permitted except that no post office interference arises as a matter of practice when a newspaper reports sports events and mentions odds offered. Pari-mutuel betting is legal in some states.

A lottery is a scheme in which a consideration is paid or given for a chance to win a prize. The necessary elements of a lottery are the furnishing of a consideration, the offering of a prize, and the distribution of award by some form of chance selection.[92]

A consideration may be anything of value, any act, or any forbearance in exchange for the right to participate in a chance for a prize. In Brooklyn Daily Eagle v. Voorhies[93] the court stated:

> The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do some-

[86] Walker v. U. S., 152 F. 111 (C.C.A.Wash.1907).

[87] Rudd v. U. S., 173 F. 912 (C.C.A. Mo.1909).

[88] Foster v. U. S., 178 F. 165 (C.C.A.Ohio 1910).

[89] Grey v. U. S., 172 F. 101 (C.C.A. Ill.1909).

[90] McConkey v. U. S., 171 F. 829 (C.C.A.Minn.1909).

[91] P.L. & R., Sec. 601.

[92] Brooklyn Daily Eagle v. Voorhies, 181 F. 579 (C.C.N.Y.1910).

[93] Ibid., 581.

thing or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get something for nothing, are amply sufficient as a motive.

It is sufficient if the lottery embraces "the elements of procuring through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value." [94]

The basis of the lottery charge in U. S. v. Wallis [95] was the following advertisement:

FIVE MORE DAYS

Arrangements Completed for Thursday's Event

The Participants of the Drawing

LIST OF SUBSCRIBERS ENTITLED TO PARTICIPATE

Five More Days Left for Delinquents to Pay Up

Next Thursday the grand drawing for the elegant Eldridge sewing machine to be given away to subscribers to the Post will take place at noon that day at this office. The plan upon which the drawing will be conducted will be as follows: Tickets, upon which will be printed numbers corresponding with the numbers on the coupons held by the paid-up subscribers, will be placed in a covered box. The fifteenth number drawn from the box will be the lucky number, the subscriber holding which will be entitled to the machine. The person drawing the numbers from the box will be blindfolded, so as not to permit of any partiality, were such a thing possible. As the numbers are drawn from the box they will be called out, and then recorded. To make the drawing more interesting, the subscribers holding the last fifteen numbers taken from the box will each receive a copy of the World's Almanac. People indebted to the Post can receive a chance to the drawing any time between now and noon next Thursday by paying up their indebtedness. Herewith are the names of subscribers entitled to participate in the drawing, with numbers held by each. If there should be any errors, we would be glad to be informed of the fact.

The object of this contest was to increase circulation of the publication in question. Each participant paid the price announced for the subscription and was given a numbered ticket;

[94] U. S. v. Wallis, 58 F. 942, 943 (D. C.Idaho 1893).

[95] Ibid.

the inducement was the chance that a subscriber's numbered ticket would be the lucky one. The price for the subscription was the same according to the established price whether or not a numbered ticket was given with the subscription; in other words, the numbered tickets were passed out free to those who subscribed, and the question naturally arose whether under these circumstances the elements of a lottery were present. The defendant, James H. Wallis, demurred to the complaint, but the demurrer was overruled.[96] The court held all the elements of a lottery were present, the tickets, the prizes, and the drawing for them by chance. The chance of winning a prize was the inducement rather than the purchase of the publication on its merits alone. The subscriber who received a numbered ticket received more than the subscriber who did not receive a chance at the drawing.

In some instances the element of certainty may go hand in hand with the element of chance, but despite the element of certainty, the effect of the whole scheme is regarded to be as a lottery.[97] If a newspaper sets up a scheme whereby a person is to pay a certain amount, part of which payment is for a subscription and another part for a prize contest to be determined by lot or chance, such a scheme is a lottery. Likewise, a scheme for the sale of bonds in which the purchaser gets a thing of value, or an investment, and also participates in a prize drawing, is a lottery.[98]

Guessing contests are commonly regarded as lotteries when such schemes involve consideration, a prize, and the determination of the winners by means of a drawing or chance. A plan based on the fundamentals of lottery for the estimating of the number of votes for president of the United States or a governor of a state, for example, are essentially chance enterprises.[99] A guessing contest to determine the number of paid admissions at a World's fair involves great elements of chance. The number of days the fair is open, the weather, the amount of promotion, the appeal of the fair to the public, and transportation facilities are all chance factors; the variation in attendance could easily vary from 10,000 to 100,000 persons, despite

[96] Ibid.

[97] Stevens v. Cincinnati Times-Star, 72 Ohio St. 112, 73 N.E. 1058, 106 Am.St.Rep. 586 (1905); 25 Op.Atty. Gen. 286 (1904).

[98] Horner v. U. S., 147 U.S. 449, 13 S.Ct. 409, 37 L.Ed. 237 (1893).

[99] Waite v. Press Pub. Ass'n, 155 F. 58, 11 L.R.A.,N.S., 609, 12 Ann.Cas. 319 (C.C.A.Mich.1907).

careful study by a so-called expert or a comparison of attendance at other large fairs or expositions.[100]

The game of keno when operated on a commercial basis has been held to be a lottery. In Boasberg v. U. S.,[101] it was pointed out by the court that the winning or losing depended on chance, not on skill or judgment.

In a dissenting opinion filed in the Boasberg case, the following observation was made:

> The operator of the game charges a commission for their use (cards) and his services, but is under no obligation to pay anything at all. It would be a strained construction to hold that there is a prize or consideration paid for the chance of winning similar to a lottery. These two elements necessary to constitute a lottery are absent. * * * If keno is to be considered a lottery, the sending of a letter by a host inviting his friends to a lotta party would be a violation of the statute. The mails would also be closed to advertisements of stores selling the game.[102]

Any contest in which skill or knowledge is necessary in the selection of the winner is not regarded as a lottery.[103] In Post Pub. Co. v. Murray,[104] the question was whether a photographic identification contest amounted to a lottery. The newspaper in question advertised that its photographers would take pictures of women shoppers. The pictures selected were to appear in the paper with the exception that the heads of the persons photographed would not be shown. A prize of $5 was to be paid to each woman who came into the office and identified her picture. An absolute check could easily be made because the paper had the photograph of each shopper's head which it could match with the part of the photograph used in the paper. It was held that this was not a lottery.

Practically all states have statutes making it an offense to advertise a lottery.[105] The theory back of such legislation is that the encouragement of schemes, whose motivation is the possibility of great profit on a low-cost charge to participate in a chance enterprise decided by lot, is *contra* to public morals.

[100] 25 Op.Atty.Gen. 286 (1904).

[101] 60 F.2d 185 (C.C.A.La.1932).

[102] Ibid., 187.

[103] U. S. v. Rosenblum, 121 F. 180 (C.C.N.Y.1903).

[104] 230 F. 773 (C.C.A.Mass.1916).

[105] 34 Am.Jur. 668, #27; People ex rel. Ellison v. Lavin, 179 N.Y. 164, 71 N.E. 753 (1904).

Food and Drugs

The Federal Food and Drugs Act was passed June 30, 1906 for the purpose of preventing adulteration and misbranding of food and drug products for use in interstate commerce. This original act was amplified in 1912 by the Sherley Amendment extending the scope of the act to include false statements about the curative effects of drugs[106] or statements of the curative effect of the drug in a reckless and wanton disregard of the truth.[107] The primary purpose of Congress was to prevent injuries to the public health through the sale and distribution of misbranded or adulterated food and drugs. Obviously, there were many situations which the act did not reach, particularly in regard to the exploitation of such articles as might come within the purview of interstate commerce and within the confines of the act.

Under the original act and its amendments prior to the passage of the Tugwell bill in 1938, the terms "misbranding" and "adulteration" embraced three types of evils, as follows:

1. False and misleading labels.
2. Failure to state the quantity or proportion of certain enumerated drugs, their derivatives and compounds, or in the case of packaged goods, omission of weight, measure or numerical count.
3. Offerings of sale of an article under the name of another article.

The scope of the act itself is definitely limited. It does protect the public from misbranding and adulteration; it does not protect against advertising of fake remedies or impure food; this function has been reached through more liberal judicial interpretation of the Federal Trade Commission Act and specifically through the Wheeler-Lea amendment to the Federal Trade Commission Act.

The statute did not attempt to make misbranding or adulteration unlawful, but rather made it unlawful to ship misbranded or adulterated drugs or food in interstate commerce.[108] The limitations may be appreciated in U. S. v. 17 Bottles, etc.,[109]

[106] Seven Cases v. U. S., 239 U.S. 510, 36 S.Ct. 190, 60 L.Ed. 411, L.R.A. 1916D, 164 (1916).

[107] U. S. v. Newton Tea & Spice Co., 275 F. 394 (D.C.Ohio 1920).

[108] U. S. v. American Druggists' Syndicate, 186 F. 387 (C.C.N.Y.1911); U. S. v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S.Ct. 337, 58 L. Ed. 658, L.R.A.1915B, 774 (1914); Weeks v. U. S., 245 U.S. 618, 38 S. Ct. 219, 62 L.Ed. 513 (1918).

[109] 55 F.2d 264 (D.C.Md.1932).

in which it was held that the statute did not apply to a booklet enclosed in a package.

Federal Trade Commission Act

To supplement the Sherman Anti-Trust Act and the Clayton Act, Congress in 1914 passed the Federal Trade Commission Act. Gradually this new law has thrown an entirely new light upon the business picture of the country. While in its early years the conception of its enforcement was to prevent monopoly and restraint of trade, the gradually encompassing menace of fraudulent advertising has become a principal activity of the Commission.

This change, made in part through the criticism of advertising, has not been without serious opposition on the part of business. The fear was that the government would so shackle advertising and sales effort that business enterprise and even freedom of the press would be hampered. The proposal known as the Wheeler-Lea bill brought into the open a heated attack upon the national governmental leaders who, it was claimed, were trying to control business under the guise of preventing a comparatively infinitesimal amount of fraudulent advertising.

Evils in the advertising of misbranded or adulterated food and drug products are within the reach of the Federal Trade Commission. Shortly after the passage of the Wheeler-Lea Amendment to the Federal Trade Commission Act, the United States Public Health Service assigned an experienced medical officer as a consultant in connection with cases involving claim in advertisements of food, drugs, and cosmetics. The Food and Drug Administration under the Department of Agriculture cooperates with the Federal Trade Commission, as do also the National Bureau of Standards, and the United States Health Service.[110]

Judicial history of the decisions in Federal Trade Commission cases indicates over the years some changing emphasis; there was a tendency to widen the scope of legal activities of the Commission, a tendency which was crystallized by the passage of the Wheeler-Lea bill in 1938.

Federal Trade Comm. v. Gratz [111] was the first case under the original Federal Trade Commission Act to come before the United States Supreme Court. The supreme court affirmed the

[110] Federal Trade Commission Annual Report for year ending June 30, 1940, p. 145.

[111] 253 U.S. 421, 40 S.Ct. 572, 64 L. Ed. 993 (1920).

decision of the circuit court of appeals which had annulled the cease and desist order of the commission. In its opinion the court stated:

> Nothing is alleged which would justify the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint. All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved.[112]

The court stressed the point that the words, "unfair method of competition" are not defined by the statute, and that their meaning is for the courts, not the commission, to interpret.[113] These words, "unfair method of competition," the court stated, "are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." [114] The Federal Trade Commission Act was not intended "to fetter free and fair competition as commonly understood and practised by honorable opponents in trade."[115]

In the early cases under the Federal Trade Commission Act, it was held that the commission was given no right to establish censorship over advertising,[116] and that the powers of the Act did not extend to cases of "super-salesmanship." In Ostermoor & Co. v. Federal Trade Comm.,[117] the court said, "The time-honored custom of at least merely slight puffing, unlike the clear misrepresentation of the character of the goods * * * has not come under a legal ban."

The court, in Federal Trade Comm. v. Winsted Hosiery Co.,[118] seemingly enlarged its concept to include control of advertising especially when such methods might be regarded as unfair methods of competition. This historic case set a precedent in extend-

[112] 253 U.S. 421, 428, 429, 40 S.Ct. 572, 64 L.Ed. 993.

[113] Ibid. 253 U.S. at page 427, 40 S.Ct. 572, 64 L.Ed. 993.

[114] Ibid. 253 U.S. at page 427, 40 S. Ct. 572, 64 L.Ed. 993.

[115] Ibid. 253 U.S. at page 428, 40 S. Ct. 572, 64 L.Ed. 993.

[116] L. B. Silver Co. v. Federal Trade Comm., 289 F. 985 (C.C.A. 1923); Raladam Co. v. Federal Trade Comm., 42 F.2d 420 (C.C.A.1930).

[117] 16 F.2d 962, 51 A.L.R. 327 (C.C. A.1927).

[118] 256 U.S. 688, 41 S.Ct. 625, 65 L. Ed. 1172 (1921).

ing the commission's regulatory powers to cover misbranding, as well as false and deceptive advertising. It was held that the misleading use of labels constituted an unfair method of competition in that goods were represented as "wool" when in fact they were not, and that trade was diverted from the producer of truthfully marked goods.

When the method of competition involved a type of lottery, the commission was upheld by the supreme court in its issuance of a cease and desist order. Even prior to the passage of the Wheeler-Lea Act in 1938, the supreme court had begun to recognize that misleading and fraudulent advertising could be controlled by the commission when such methods involved unfair competition in interstate commerce, as may be seen in the Winsted case. The restricted view of the act was severely criticized by legal critics, but the liberal application of advertising censorship came into its legal right through the Wheeler-Lea Amendment. The earlier concept that the commission could act only when a method of competition injured a competitor engaged in interstate commerce is nullified by this amendment; it is now no longer necessary to prove that a competitor is injured in order to give the commission jurisdiction to enforce its regulations. The extent of its regulation and authority may be seen in General Motors Corporation v. Federal Trade Comm.[119] The commission investigated the General Motors' plan for consumer sales and found that the public understood the plan to mean that 6 per cent simple interest per annum would be charged on motor car sales, as computed on the declining balance as reduced by the monthly payments.[120] Actually, the commission found that the motor car purchaser paid an increasing rate of interest on the total amount originally owed, until finally the charge amounted to approximately 11½ per cent simple interest on the original balance as reduced by monthly payments. The General Motors Corporation contended that the commission did not have jurisdiction of the case because the arrangement was entirely local rather than an arrangement within the confines of interstate commerce; however, the commission's order to cease and desist was affirmed.

Through the Wheeler-Lea Act, limitations upon the functioning of the commission have been removed to a degree. Formerly, it was necessary that three requirements were necessary to give

[119] 114 F.2d 33 (C.C.A.1940); cert. denied 312 U.S. 682, 61 S.Ct. 550, 85 L.Ed. 1120 (1941).

[120] Federal Trade Commission Annual Report for year ending June 30, 1940, p. 81.

the commission jurisdiction in unfair methods of competition cases, namely,

1. An unfair method must exist.
2. The method used must be a method of competition in interstate commerce.
3. The proceeding to prevent the use of the method in particular must appear to be in the interest of the public.[121]

If any one of the foregoing requirements did not exist, the commission had no power to act. Under the Wheeler-Lea Amendment, no allegation is necessary to the effect that a competitor is being injured by the method being investigated by the Commission, when the advertisement concerns food, drugs, devices (for use in the diagnosis, prevention, or treatment of disease), and cosmetics.

The Radio and Periodical Division handles cases involving fraudulent and misleading advertising, which violated the provisions of the Federal Trade Commission Act. This division conducts surveys in search of questionable advertising; current specimens are checked against previous orders of the commission and stipulations accepted by advertisers.

For the fiscal year ending June 30, 1941, the commission procured 1,831 editions of representative newspapers of established general circulation, and 1,824 editions of magazines, farm, and trade journals having interstate distribution; these publications represented a total circulation of 148,425,809. In these newspapers, magazines, trade and farm papers, 377,764 advertisements were examined; 25,022 advertisements of the total examined were found to contain representations that appeared to be false or misleading. During the same period, the commission received 857,890 copies of commercial radio continuities, amounting to 1,737,181 pages of typewritten script, and examined 871,909 commercial radio continuities, totaling 1,749,557 pages of typewritten script. From this material 24,535 commercial broadcasts were selected for further investigation in connection with possible false or misleading representations. Examinations of almanac and mail order advertising were also conducted. The foregoing statistical results are cited here to indicate the volume of business handled in checking advertising for possible false or misleading advertising.

[121] Federal Trade Comm. v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191 (1931).

When it appears that an advertisement published in a newspaper or periodical or broadcast over a radio station contains false or misleading statements, a questionnaire is sent to the advertiser, with a request for a sample of the product advertised, if this is practicable, or a quantitative formula, if the product is compound; likewise, copies of all advertisements either published or broadcast for a specific period are requested, together with copies of supplementary advertising material, such as booklets, folders, form letters, and similar material. If samples are received, they are referred to the commission's medical advisory division, or other appropriate technical governmental agency for its scientific opinion.

If false or misleading claims are found in this searching examination, the advertiser in question is informed in regard to such claims and the scientific opinions of the commission's experts. The advertiser is given the privilege of submitting evidence in support of his claims.

If it appears that the claims of the advertising are true, the division recommends to the commission that the case be closed; however, if it appears from the weight of the evidence, that the claims are in fact false or misleading, the division recommends to the commission that a complaint be issued, or that the division negotiate a stipulation under which the advertiser could agree to cease and desist in a continuation of the acts and practices found to be false or misleading. If a stipulation is made, the advertiser is required to submit to the commission within 60 days from the date of acceptance a report that he has complied with and is complying with the provisions of the stipulation.

If the commission issues a cease and desist order which the advertiser ignores, he is subject to a civil penalty of not more than $5,000 for each violation. If there is a violation of the Wheeler-Lea provisions of the Federal Trade Commission Act, whereby false or misleading advertisements concerning food, drugs, devices, and cosmetics are disseminated, the commission may bring suit in a United States District Court to enjoin the dissemination of such false or misleading advertising pending issuance and final disposition of the commission's complaint. Continued dissemination of the false or misleading advertising of a commodity which may be injurious to health or which is intended to defraud or mislead, constitutes a misdemeanor, subjecting the offender to a fine of not more than $5,000, or imprisonment of not more than six months, or both. For succeeding convictions, the offender is sub-

ject to a fine of not more than $10,000, and imprisonment of not more than one year, or both.

Incidental to the World War II, the Director of Censorship requested the Federal Trade Commission to analyze, summarize, and report to the Office of Censorship all advertising in newspapers, magazines, and radio broadcasts containing any reference to the war, war economy, war production, the armed services, price rises or trends, rationing, priorities, and conservation of paper, rubber, and other materials. Any advertising that may contain violations of the Office of Censorship is reported by the Director of Censorship.

For the fiscal year ending June 30, 1941, a total of 219 complaints were issued charging false and misleading representations in advertising, labels, and otherwise, as follows:

Ninety-six complaints alleged false and misleading representations as to the therapeutic value of various medicinal and food preparations and devices; 22 alleged misrepresentations as to the potency, performance, or results to be obtained by the use of various products; 22 charged misrepresentation as to composition, quality, ingredients, construction, or condition, including alleged misrepresentation of old products for new; 14 alleged that products were represented as possessing quality or qualities they did not have or as being made of material of a different character from that of which they actually were composed, the latter classification embracing principally leather goods, furs, and steel blades. Eighteen complaints alleged passing off of domestic products as imported or of imported products as domestic or of domestic products as manufactured in a locality nationally famous for the particular product. Nine of these involved the use of names simulating the names of oriental rugs to designate rugs made in this country by machinery. Eleven complaints charged misrepresentation of correspondence schools or home-study courses.

Nine complaints alleged misrepresentation as to business status, such as business connections, and size and extent of plant or business. This category also included the representation by distributors that they were producers. Nine complaints alleged use of fictitious price marketings, or value, including in some instances also alleged misrepresentation as to the character of the product. Other complaints alleged misrepresentation of methods of doing business, value of coupons, and conditions under which coupons were redeemed; disparagement of competitor's product; the misrepresentation that the advertised product had been tested and approved by nationally known laboratories; intimidation by the false representation that a competitor's product was an infringement of copyright; misrepresentation of terms and conditions of purchase; of merchandise as gratuitous; of financial re-

turns to agents; of profits to purchasers or representatives, equipment used, value of product and services to be rendered; misrepresentation through use of the term "free samples" and misrepresentation that the regular and usual selling price was a specially reduced price for a limited time; misrepresentation of the quantity of product by the use of oversize containers; misrepresentation through the use of the name "University Press" that a business was owned by a university and operated a printing establishment; misrepresentation of character of business by the use of misleading trade names; of certain products as being exclusive, limited or restricted; misrepresentation by the appropriation and use of trade names of competitors, or nationally known manufacturers; and false representation of price, of guarantees and of ownership and operation of laboratories.[122]

For the fiscal year ending June 30, 1941, the commission forwarded questionnaires to advertisers in 374 cases, and to advertising agencies in 19 cases. Two hundred thirty-four stipulations respecting radio and periodical advertising were accepted. The total number of cases closed through various methods of procedure numbered 605, distributed as follows: [123]

Settled through compliance with previously negotiated negotiations.	222
Closed for lack of jurisdiction or lack of evidence sufficient to establish a violation of law.	221
Discontinued business, or practices, or insufficient public interest	143
Handled by Post Office Department through fraud orders against advertisers.	12
Handled by Post Office Department which accepted affidavits of discontinuance of business	7
	605

Any fair-minded publisher of a reputable newspaper or periodical, or any advertising executive of an advertising agency subscribing to ethical practices, it is submitted, would recognize that the Federal Trade Commission has raised the level of advertising and that the public has been benefited. Any examination of the more flagrant cases that have been handled by the commission would be sufficient proof that voluntary efforts on the part of publishers and advertisers are not sufficient to prevent fraud and misleading representations.

[122] Federal Trade Commission report for the year ending June 30, 1941, pp. 46, 47.

[123] Ibid., 135.

There has been fear that the regulation of advertising by the government would encroach freedom of the press. There is a danger, it is true, but if equitable laws are enacted and if they are administered by honest officials, the danger should be little. It may be freedom to drive one's car 90 miles an hour down Sheridan road, but such freedom ceases when its exercise endangers the rights and lives of others. Regulation of traffic on the highways is commonly accepted; rules are established and accepted in football and other sports. There is no reason why such a large manifestation of human activity as advertising should not be sanely regulated for the benefit of the public, the advertiser, and the publisher.

Safeguarding Investment

The Securities and Exchange Commission exercises special powers to prevent false and misleading statements in regard to securities. Section 17 (b) of the Securities Act of 1933 makes it unlawful, through use of the mails or interstate commerce, to publish any article, advertisement, or other communication, though not purporting to offer a security for sale, which describes such security for a consideration, received or to be received, without disclosing the receipt, past or prospective, of a consideration. The main purpose of this provision is to stop "tipster" sheets and newspaper analyses which purport to give an unbiased opinion as to the merits of a security, when in fact the opinion has been bought by persons interested in the particular security. Violation of the regulations of the Security Act, if willful, subjects the violator, upon conviction, to a fine of not more than $5,000, and imprisonment for not more than five years, or both. This provision applies to all securities whether exempted from the act or not.

Under Section 9(a) (4) of the Securities Exchange Act of 1934, any material false or misleading statement made for the purpose of inducing the sale of a security subjects the person making such statement, if that person knew or had reasonable ground to believe the statement in question false or misleading, to a fine of not more than $10,000, and imprisonment of not more than two years, or both.

Provision is made also for civil liability to the person damaged as a result of violation of these Security Acts.

Conspiracies to Restrict Advertising

Unlawful restraint of commerce was charged against 15 New York department and apparel stores and the Retail Dry Goods

Association of New York City early in 1943 when they agreed to withhold advertising from the *New York Times*.[124] This action was taken by the stores and the association in answer to an announcement by the *Times* that advertising rates would be increased. The United States Department of Justice filed an information charging that the defendants were guilty of criminal violation of the anti-trust law in their action to control advertising rates.

The defendants pleaded *nolo contendere* (I do not wish to contend); in the United States District Court, the defendants were assessed fines of $5,000 each, or a total of $80,000.

This case sets an unprecedented example in protecting newspapers against conspiracies to force newspapers to establish advertising rates. In thus preventing a conspiracy which would injure newspapers by withdrawal of normal income from advertising service, the Sherman anti-trust law was utilized in maintaining freedom of press so far as concerns the business phase of publishing.

§ 86. PROMULGATION OF LAW

It is the essence of legal administration of government that laws be made known to the citizens of a democracy.

Public advertising is both a protection to democracy and an information service to its people. While it is recognized that there are many citizens who do not read much legal advertising, the very fact that such public notice and information are given regularly constitutes political insurance; it is a check upon public service.

Vast sums are spent annually in giving the public information about their various units of government, the school district, the township, the village, the city, the county, the state, and the Federal government. Much public information arises through the news reporting of the press about governmental activities. Public officials give addresses and make reports. But the official details of government, the record of what is being done and what is to be done, can hardly be handled as mere items of news. The newspapers can give only the high lights of activities and policies.

Statutes require that certain reports and records be made public through paid announcement or published records. Newspapers

[124] Editor & Publisher, April 17, 1943, p. 11.

are of prime importance as media for the dissemination of much of this information. There are three types of newspapers available for such publication, newspapers of general circulation, specialized business and legal newspapers, and official government newspapers. Public advertising may be handled through other media, such as public notices posted in conspicuous places, pamphlets, and the radio.

In a representative government, it is felt that constructively every individual is present and should know what takes place in the legislature. This theory was established in Rex v. The Bishop of Chichester,[125] when the court in 1366 denied the defense of the bishop and stated:

> Granting that proclamation was not made in the counties, nevertheless everyone is considered to know what is done in Parliament; for as soon as Parliament has concluded anything, the law presumes that every person has notice of it; for Parliament represents the body of all the realm; wherefore it is not necessary to have the proclamation where the statute took effect before.

As common law became more complicated and diffuse, the knowledge of the law became more and more confined to the lawyers. It was felt accordingly that the more important legislative acts should be known in the shires and boroughs despite the earlier decision in Rex v. Chichester.[126]

Ignorantia juris non excusat, or ignorance of the law does not excuse, is an established legal maxim, although ignorance of an intrinsic fact may excuse. As Bouvier states, "Ignorance of law consists of the want of knowledge of those laws which it is our duty to understand, and which every man is presumed to know." [127]

Under Anglo-American political theory, the public supposedly should know the law, but this theory is not actually carried out in practice; to apprise the public of the law is a gesture, for it is impossible for anyone really to know all the law affecting his government and its various units. In practice the fruition of this theory is a presumption. Many members of the public seemingly do not care to know the laws; vaguely they have in mind certain rights and restrictions and when occasion demands they *feel* that

[125] Y.B., 39 Edw. III, Pasch., p. 7.

[126] Holdsworth, W. S., History of English Law, Vol. 11, p. 436.

[127] Bouvier, John, Law Dictionary, Vol. 1, p. 1488.

they have the opportunity to learn what the law actually is, either through inquiry from officials or through legal counsel.

Laws are promulgated, or made known; they are formulated, established, and made available. Promulgation differs from publication. Promulgation of law is really a public affirmation on the part of governmental authorities; publication is the giving of notice to those interested, whether such notice actually comes to the public's attention or not.

Municipal law is a prescribed rule, according to Blackstone, "because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law." [128]

It is the essence of law that it should be known before it becomes binding. Copies of the laws obviously cannot be sent to every citizen, but they should be so distributed that every individual *may* find them readily accessible.[129]

Promulgation of law, well-grounded in legal and political theory, is to some degree a fiction; yet it is essential that laws be made known. The potential right of the individual to know the law under which he lives is a protection; moreover, it is one definite keystone of democracy. To the intelligent individual, the essential law can be made available. Such promulgation embraces several methods which upon an historical basis are as follows:

1. Promulgation through natural law.
2. Promulgation through custom.
3. Promulgation through publication.
4. Promulgation through representation.

Stressing the importance of promulgation of law, Blackstone stated:

> The manner in which this notification is to be made, is matter of very great difference. It may be notified by universal tradition and long practice, which presupposes a previous publication, and is the case of the common law of England. It may be notified, *viva voce,* by officers appointed for that purpose, as is done with regard to proclamations, and such acts of Parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of Parliament. Yet, whatever way is

[128] Blackstone, William, Commentaries on the Law of England (Cooley ed.), Vol. 1, p. 44.

[129] Walker, Timothy, Introduction to American Law (11th ed.), #17, p. 52.

made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectively to ensnare the people.[130]

Promulgation Through Natural Law

God as the mother of nature and the keeper of conscience has been regarded by philosophers as the first promulgator of law. God has been regarded as the author of divine law. Cicero well states this view in *De Re Publica,* as follows:

One eternal and unchangeable law will be valid for all nations and all times, and there will be one master and one ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.[131]

This thought as given by James Wilson, former associate justice of the United States Supreme Court, follows:

Laws may be promulgated by reason and conscience, the divine monitors within us. They are thus known as effectually, as by words or by writing: indeed they are thus known in a manner more noble and exalted. For, in this manner they may be said to be engraven by God on the hearts of men: in this manner, he is the promulgator as well as the author of natural law.[132]

Promulgation Through Custom

Immemorial custom formulates basic legal conception. Carried through the ages tradition has fastened custom upon national groups; custom has crystallized into records and statutes. Custom is evidence of experience modified and backed by opinion; further, to a considerable extent, custom implies common consent. As pointed out by the jurist, James Wilson, "This mode of promulgation points to the strongest characteristic of liberty, as well as of law. For a consent thus practically given must have been given in the freest and most unbiased manner." [133]

The common law of England and common custom have been regarded as synonymous, although in fact, such a conclusion is not in reality correct. Local customary law, it is true, found its

130 Blackstone, William, Commentaries on the Law of England (Cooley ed.), Vol. 1, p. 44.

131 Cicero, De Re Publica (Keyes ed.), Book III, XXII, p. 211.

132 Wilson, James, Works, Vol. 1, p. 58.

133 Wilson, James, Works, Vol. 1, p. 57.

source in local practices, both social and economic, as well as legal. But, as pointed out by Salmond, the common law was created largely through the decisions of the royal courts of justice. Common law is essentially case law, built and continued by statute and precedent, rather than developed through customary law.[134]

Lex Mercatoria, or the law merchant, was clearly developed on the basis of custom. This law was a law of nations, under which prior to the seventeenth century the prevailing customs of the merchants and shippers of England, France, Italy, and Spain were enforced. So far as England was concerned, the common law courts were too slow and too technical for traders and shippers of the principal seafaring nations; consequently, there were set up *pie poudre* courts which handled legal business relations fairly and expeditiously, particularly contracts, partnerships, joint-stock associations, bills and notes, insurance, and maritime law.[135]

At the beginning of the reign of Henry II in 1154 law was essentially local rather than national; local courts of the manor and of the county administered both civil and criminal law for the majority of the people; the King's court concerned itself mainly with the issues affecting the leaders of the nation.[136]

The transition from customary law to national law came under Henry II and this period marks the real beginning of the common law as a unified system of written law for the entire country.[137] The first really great treatise on the common law was "A Treatise on the Laws and Customs of England" written under the name of Ranulph de Glanvil, Justiciar for Henry II, although it is not known whether Glanvil or his kinsman, Hubert Walter, who later became Archbishop of Canterbury, actually wrote the book.[138]

Promulgation Through Publication

Publication of laws is to give notice or make public. Such publication does not mean necessarily making thoughts public by means of printing. To make known the laws, announcement may be made vocally at an assembly or public meeting; the announce-

134 Salmond, Sir John, Jurisprudence (7th ed.), p. 207.

135 Walsh, W. F., History of English and American Law, p. 443.

136 Ibid., 78.

137 Ibid., 86, 87.

138 Radin, Max, Anglo-American Legal History, p. 278.

ment may be inscribed on a tablet of stone, painted on a wooden plaque, or marked and burned into clay slabs.

So far as history advises the student of legal development, the ancient king was probably the transmitter of the law, rather than the lawmaker.

The ancient lawgivers, either in theory acting for a divine person, or in actuality acting for themselves and their associated leaders, established significant legal systems that in several cases have been operative for centuries. The oldest system, the Egyptian, dating beyond 4,000 B.C., contributed Menes (3200 B.C.) and one of the greatest royal legislators, Harmhab (1100 B.C.). The next in order of time was the Mesopotamian system, of which Hammurabi (2000 B.C.) was perhaps the greatest lawgiver. The third in origin was the Chinese, of which Confucius (500 B.C.) was its greatest ancient lawgiver; his philosophy covered both morals and politics. Confucius thought of himself as a transmitter of law rather than a maker of law. The Hindu legal system ranks among the oldest, but to the student of Anglo-American jurisprudence perhaps the Hebrew is more important. Its contribution included the greatest of the moral codes, the Ten Commandments, and the Talmud, a cyclopedic treatment of knowledge covering law and other fields.[139]

§ 87. LEGAL ADVERTISING

The newspaper is used to announce new laws, report on governmental business, and serve notice of legal acts upon individuals.

Legal advertising in the press is space paid by governmental units, litigants, or other persons required by statute to give notice of laws, notice to persons concerned with court business, and notice of business affected with a public interest as specified by statute.

Legal advertising may appear in media other than the press, for example, in books, pamphlets, posters, personal service, or by radio. Because of the amount of legal advertising done in the press, this phase of advertising is highly important to both the public and newspaper publishing interests.

[139] Wigmore, J. H., Panorama of the World's Legal Systems, Vol. 1, gives an authoritative treatment of these early legal systems and their principal lawgivers.

Generally, legal advertising has come to mean three types of legal notices, namely, promulgation of laws, the service of process by publication, and public advertising. The purpose of these types of advertising is to advise the individual what the laws are, when his rights are affected, and how the administration of government is being conducted.[140]

Notices required to be published cover a wide range of activities. Both the kind of notice and the specific requirements for publication vary with individual states. For information on the nature of classifications, reference should be made to the statutes of the several states and the revised statutes of the United States. Some states have compiled manuals of laws affecting newspapers or digests of notice by advertisement. Among the states having such digests are Minnesota, Michigan, New York, Indiana, Iowa, Louisiana, Ohio, and Wisconsin. Representative classifications required to be published are: (1) state statutes, city and village ordinances; (2) council, township, county board, and school district proceedings; (3) notice of intention for corporation charter, amendment to the articles of incorporation, notice of intention to apply for a co-operative credit association charter, notice of formation or dissolution of limited partnership; (4) notices relative to executors, administrators, and decedent estates; (5) notice of elections; (6) appropriation of public funds; (7) tax notices; (8) bids for work, material or service in connection with public improvements; (9) judicial orders; and (10) referendum notices.

Newspapers do not have to accept legal advertising unless their publishers wish to do so, according to widely accepted legal decisions. No reason need be assigned for refusal. For some newspapers, legal advertising may not be profitable, for the reason that the rate based on high circulation would not be commensurate with the rates allowed for such public notices.

Inasmuch as a newspaper is not a public utility, it is not subject to government control as to the reasonableness of its rates.[141] It was held in Re Wohl [142] that a newspaper is not at common law a business impressed with a public interest. If a publisher accepts the advertising, he is bound to fulfill his obligation under the statute providing for the publication of the particular official

[140] Bailey, Gilbert, Legal Advertising, Introduction, p. 1. This study is a mimeographed publication by the Bureau of Government Research, Indiana University, issued in 1941.

[141] Sharon Herald Co. v. Mercer County, 132 Pa.Super. 245, 200 A. 880 (1938).

[142] 50 F.2d 254 (D.C.Mich.1931).

notice.[143] In Wooster v. Mahaska County,[144] the *Oskaloosa Weekly Journal* applied to be appointed an official newspaper. A question arose relative to the rate of payment. The publisher stated that he accepted the proceedings of the board of supervisors with the rate under protest. It was held that he did not have to accept that advertising; the court stated:

> Neither the legislature nor the board could compel the paper to publish the proceedings, no matter what compensation might be fixed therefor, and, if the plaintiff was not satisfied with the rate fixed by the board, he was under no obligation to do the work. If no rate had been fixed in advance, the plaintiff would only be entitled to reasonable compensation, not exceeding the limit fixed by the law.[145]

Sharp conflict exists between the generally accepted theory that the newspaper, not being a public utility, need not accept advertising and the theory that a newspaper must accept offered advertising from governmental units. If a newspaper has accepted an appointment as an official paper for a city, county, or state, it thereby consents to cooperate with that governmental body by taking official advertising from that source. From the broad social viewpoint a newspaper does have a duty to perform in keeping with good citizenship, but legally unless a newspaper has consented to take official advertising, it has no legal obligation to do so.

May mandamus [146] be used to force a publisher to publish official notices? While a publisher may use mandamus to force a public officer to advertise official notices required by statute to be published in a newspaper, it is doubtful if the publisher can be forced, either by mandamus or mandatory injunction, to accept copy.[147]

In Wisconsin there is a forfeiture for refusal to publish a legal notice, according to the following statute:

> If the publisher or printer of a newspaper shall, after payment or tender of his legal fees therefor, refuse or wilfully

[143] Belleville Advocate Printing Co. v. St. Clair County, 336 Ill. 359, 168 N.E. 312 (1929).

[144] 122 Iowa 300, 98 N.W. 103 (1904).

[145] Wooster v. Mahaska County, 122 Iowa 300, 301, 98 N.W. 103.

[146] A mandamus is an extraordinary legal remedy or prerogative writ commanding a person or corporation to whom it is addressed to do some act which it has a duty to perform.

[147] Under an Ohio statute, 6319-6 (Page's Code 1938), a refusal to publish public advertising will subject the publishing company to conviction for a misdemeanor and a fine not exceeding $1,000, and the person so refusing to a fine not exceeding $500.

> neglect to publish any legal notice required in pursuance of law or a lawful order of publication to be published in his newspaper, being able to make such publication, he shall forfeit twenty-five dollars, one-half to the party prosecuting therefor.[148]

While the foregoing statute may be constitutional so far as forcing publication after the publisher has accepted his fee for publication, it is doubted whether the mere tender of his fees by the person or officer offering same would bind the publisher, despite the statute.

It is submitted that such means as the issuing of a writ of mandamus and the assessment of penalties for failure to publish are not constitutional when the newspaper has not accepted an appointment as an official newspaper or has not in the first instance accepted the copy for publication. A refusal to accept copy would be unusual, for ordinarily newspapers want all the business they can obtain.

Once a newspaper has accepted a legal notice for appearance in its columns, negligence in not publishing or refusal to publish could be penalized by law; an injured private party also might sue for damages when a legal notice affecting his interest fails to appear.

In this study of the press, the newspaper field is primarily considered, and so stress will be made on this phase of public advertising. It is necessary, first, to define what a newspaper is, for the purpose of public advertising. Probably no entirely satisfactory definition has been evolved so far as the statutes are concerned. To be eligible for the acceptance of public advertising, it is considered essential that a newspaper meet the following conditions: That the newspaper (1) publish news of general interest, (2) have a general, rather than a restricted circulation, (3) be published not less frequently than once each week, (4) be published in a certain area or district, (5) be published in the English language, and (6) perhaps be designated as acceptable, as of a particular political party affiliation.

Statutes on legal advertising do not generally specify all these six elements as essential to eligibility. Either a daily or a weekly newspaper, or both, may be specified by statute as eligible for legal notices. A daily newspaper is regarded as one published at least five times a week.

[148] Wis.Stat.1941, § 331.24.

Provision is made in statutes for specific requirements for legal notices. These requirements concern the designation of the papers eligible for legal advertising, the place of publication of the newspaper or newspapers selected, number of newspapers in which legal notices should appear, compensation for legal advertising, and proof of publication.

Generally, the newspaper selected for legal notices is published within the jurisdiction of the body making the designation. In some cases, particularly in sparsely settled parts of the country, provision is made for the publication of legal notices in a newspaper outside the jurisdiction of the selecting body; this could easily be the case when there is no newspaper published in a town or county, or at least no newspaper of a particular political party, which at the time might have a majority of the voters at the last election, or a majority of the members of the board of county commissioners.

Proof of publication is of prime importance to the publisher. If the proof of publication is not made according to the provisions of the statute, the publication is ineffective. An affidavit with a copy of the printed legal notice annexed thereto is required, and certain designated persons are eligible to make such affidavits. In Wisconsin, the editor, publisher, printer, proprietor, the principal foreman of the shop, or the principal clerk in the office is eligible to make such affidavits. In other states, the range of eligible persons may not be so all inclusive.

What may be legally regarded as a newspaper of general circulation has been fairly well determined. A newspaper of general circulation is one which has circulation among all classes, not being confined to circulation among one particular calling or business.[149] The question does not depend upon the number of subscribers so much as upon the diversity of the classes of subscribers.[150] In a city in which there is a newspaper which specializes in legal and business news but which carries considerable news of general interest, the right of such a newspaper to publish legal advertising has been challenged.

One test in this class of cases is whether the particular newspaper is published primarily for the purpose of getting the legal advertising, confining its editorial service strictly to legal news.

[149] Elsenberg v. Wabash, 355 Ill. 495, 189 N.E. 301 (1934).

[150] N. H. Ranch Co. v. Gann, 42 N. M. 530, 82 P.2d 632 (1939); State ex rel. Bowler v. Board of Com'rs of Daniels County, 106 Mont. 251, 76 P.2d 648 (1938).

In Finnegan v. Buck,[151] the *Legal Daily* of Buffalo, N. Y., was held not to be a newspaper of general circulation on the ground that its contents related primarily to legal matters, court calendars, judgments entered in the county clerk's office, mortgages and deeds recorded, and similar information. The *Legal Daily* contained some plate matter covering general news, which however was old news, or news that had appeared in the regular daily newspapers two to five days previously; this material was not especially to give a record of daily events commensurate with the usual service of a daily paper, but was rather of the filler variety. In Eisenberg v. Wabash,[152] it was stated:

> There is no requirement in the law that a newspaper, in order to be secular and of general circulation, must be distributed from news stands and by newsboys. All that is required is that it be secular in character, that it circulate among different classes of readers, and that it dispense information which is of interest to the general public. A rule that would require newspapers to be sold by newsboys or from news stands before it could be a newspaper of general circulation would automatically eliminate hundreds of weekly newspapers throughout this state from use as papers of publication. The fact that a newspaper is not sold at a news stand or by a newsboy does not mean that it is not read generally by subscribers who get it through the mails. The general circulation of a newspaper is not determined by the number of subscribers, but by the diversity of its subscribers.

The court in Kellogg v. Carrico [153] emphasized:

> It is not the particular kind of intelligence that constitutes one publication a newspaper rather than another. Newspapers are devoted to the dissemination of intelligence on a great variety of subjects, such as politics, commerce, temperance, religion, and so on; and the law and legal topics and occurrences are not excluded from the range of newspaper enterprise.

When legal notices are published in an early edition of a metropolitan newspaper and when such early edition is small in scope and treatment, with a minimum number of readers in comparison with the total circulation, the paper's status as a legal newspaper is in doubt. The *Evening Star* of Seattle issued a noon edition of the *Evening Star* which edition had no subscribers at the time of

[151] 187 N.Y.S. 705 (Sup.1921); aff. 197 App.Div. 927, 188 N.Y.S. 920 (1921), 231 N.Y. 638, 132 N.E. 920 (1921); reargument denied, 232 N.Y. 499, 134 N.E. 545 (1921).

[152] 355 Ill. 495, 498, 189 N.E. 301.

[153] 47 Mo. 157, 158 (1870).

making a bid for official advertising, but which later had a subscription list of 360 with a total circulation of 1,083 papers. The population of the city was more than 240,000. Under these circumstances it was held that this edition did not constitute a newspaper eligible for official advertising.[154]

In an early case, Beecher v. Stephens,[155] it was held that the *Northwestern Reporter* was not a newspaper, but rather a legal periodical devoted to giving reports of court decisions made principally in the supreme courts of Minnesota and Wisconsin, occasional decisions of other courts, a court directory, cards of attorneys, real estate transfers in Ramsey County, legal anecdotes, book notices, and advertising.

In Burak v. Ditson,[156] the question was the determination whether the *Daily Reporter* of Sioux City, published every day except Sundays and holidays, was a newspaper of general circulation, despite its circulation of 500 and its coverage of legal and business news, together with a limited amount of news of current events. Justice DeGraff in giving his opinion stated:

> A study of the decisions bearing on the question before us suggests the following criteria: First, that a newspaper of general circulation is not determined by the number of its subscribers, but by the diversity of its subscribers. Second, that, even though a newspaper is of particular interest to a particular class of persons, yet if it contains news of a general character and interest to the community, although the news may be limited in amount, it qualifies as a newspaper of "general circulation." [157]

When a specialized legal and business paper carries some general *bona fide* news and attempts to offer a news service to its readers on the basis of general news selected for the importance of its possible impact on law and business, possesses a circulation well distributed about business and professional interests, and publishes display advertising from various business fields, it may be regarded as a newspaper of general circulation eligible for official advertising.

The term "general" would seem to mean diversified and sufficiently extensive to be possible to reach a considerable number of readers. It has been held that the *Chicago Daily Law Bulletin*, which has been published every week day, holidays excepted,

[154] Times Printing Co. v. Star Pub. Co., 51 Wash. 667, 99 P. 1040, 16 Ann. Cas. 414 (1909).

[155] 25 Minn. 146 (1878).

[156] 209 Iowa 926, 229 N.W. 227, 68 A.L.R. 538 (1930).

[157] 209 Iowa 926, 930, 229 N.W. 227, 68 A.L.R. 538.

since 1854, was a newspaper legally eligible for official advertising under the Federal Bankruptcy act.[158] This publication is devoted principally to news and notices of proceedings in Cook County and Federal courts located in Chicago, together with a small amount of general news and advertising. Its circulation is not large when compared with the circulation of the *Chicago Tribune,* the *Chicago Daily News,* or other papers of that city; yet it reaches a substantial number of diversified readers.

Other specialized newspapers of this type have been held as legally eligible for official advertising, among which newspapers have been the following: *Chicago Law Journal Weekly,*[159] *Chicago Legal News,*[160] *Chicago Recorder,*[161] *Daily Bulletin,* Seattle,[162] *Daily Reporter,* Indianapolis,[163] *Daily Reporter,* Milwaukee,[164] *Daily Reporter,* Sioux City, Iowa,[165] *Kansas City News,*[166] Omaha *Mercury,*[167] St. Louis County *Legal Record & Advertiser,*[168] *Sunday Welcome,* Portland, Ore.,[169] and the *Wayne County Legal News,* Detroit.[170]

When the statute under which official advertising is awarded sets the standard as the highest local circulation at the lowest price, the basis would be the ratio of the bid price to the number of *bona fide* subscribers.[171]

A newspaper may be designated an official paper by a body with legislative powers. A board of county commissioners may designate a newspaper within its jurisdiction for the publication of its proceedings, thus making it the official paper for that

158 In re Sterling Cleaners & Dyers, 81 F.2d 596 (C.C.A.Ill.1936); see also Railton v. Lauder, 126 Ill. 219, 18 N.E. 555 (1888).

159 Pentzel v. Squire, 161 Ill. 346, 43 N.E. 1064, 52 Am.St.Rep. 373 (1896).

160 Kerr v. Hitt, 75 Ill. 51 (1874).

161 Eisenberg v. Wabash, 355 Ill. 495, 189 N.E. 301 (1934).

162 Puget Sound Pub. Co. v. Times Printing Co. and City of Seattle, 33 Wash. 551, 74 P. 802 (1903).

163 Lynn v. Allen, 145 Ind. 584, 44 N.E. 646, 33 L.R.A. 779, 57 Am.St. Rep. 223 (1900).

164 Hall v. City of Milwaukee, 115 Wis. 479, 91 N.W. 998 (1902).

165 Burak v. Ditson, 209 Iowa 926, 229 N.W. 227, 68 A.L.R. 538 (1930).

166 Kansas City v. Overton, 68 Kan. 560, 75 P. 549 (1904).

167 Hanscom v. Meyer, 60 Neb. 68, 72, 82 N.W. 114, 48 L.R.A. 409, 83 Am.St.Rep. 507 (1900).

168 Kellogg v. Carrico, 47 Mo. 157 (1870).

169 United States Mortgage Co. v. Marquam, 41 Or. 391, 69 P. 37, 41 (1902).

170 Lynch v. Durfee, 101 Mich. 171, 59 N.W. 409, 24 L.R.A. 793, 45 Am.St. Rep. 404 (1894).

171 City of San Buenaventura v. Ventura County Star, 29 Cal.App.2d 41, 83 P.2d 975 (1939).

body.[172] The legislature may likewise designate any newspaper within the state as the official newspaper. In Wisconsin the statutes provide for an official state paper for the publication of laws, proclamations, and legal notices and advertisements.[173]

Official bulletins or journals published by the municipality, especially in metropolitan communities in several instances have been attempted. The *Toledo City Journal* was established in 1916 for the purpose of publishing all the city's official advertising, with the exception of election notices. In this publication little general news is given; it does not purport to be a newspaper of general circulation. Its validity as a medium for official advertising has not been seriously questioned. The paper is sold at a subscription rate of $1.00 a year.

The City of Cincinnati in 1927 passed an ordinance for the establishment of the *City Bulletin,* to be managed by the clerk of the city council. This ordinance provided for the publication of all ordinances and resolutions passed by the city council, all resolutions adopted by the various city boards and commissions, all notices and advertisements required by law or ordinance, official reports of council proceedings, reports on official actions of the various city departments, proposals for bids on public contracts, and publication of such other material as the council may authorize. The publication of these official city journals centralizes official notices and in communities the size of Cincinnati likely saves the taxpayers some expense. For the five year period prior to February 24, 1934, the *Toledo City Journal* claims to have saved the taxpayers $100,000.[174]

The legality of notices published in the *City Bulletin* of Cincinnati was questioned in Bising v. City of Cincinnati,[175] when an effort was made to enjoin the city from collecting a special assessment levied against the petitioner's property on the ground that the publication of the assessment notice in the *City Bulletin* did not constitute valid notice under the due process clause and that the *City Bulletin* was not a newspaper as defined by the city charter, the city ordinance, or the Ohio General Code. In giving its decision, the Ohio Supreme Court declined to rule on the due process issue but held that the notice was invalid because the *City Bulletin* was not a newspaper as defined by law.

[172] Shelden v. Fox, 48 Kan. 356, 29 P. 759, 16 L.R.A. 257 (1892).

[173] Wisconsin Statutes, 1937, c. 35, #35.02.

[174] Toledo City Journal, Feb. 24, 1934.

[175] 126 Ohio St. 218, 184 N.E. 837 (1933).

Later, in State ex rel. Ellis, City Solicitor, v. Urner, City Auditor,[176] the Ohio Supreme Court held that contrary to its decision in the earlier case of Bising v. City of Cincinnati, the *Cincinnati City Bulletin* came within the meaning of the city ordinance and charter.

Questions arise regarding the meaning of "printing" and "publishing". Is a newspaper printed in a certain town if the two inside pages for example are "ready print" actually printed by the Western Newspaper Union in Chicago and the two outside pages printed in the home-town plant? What if a considerable part of the paper is plate material or mats, the material for which comes through a syndicate? *All* the paper would not be printed in the home town, but on the other hand, the paper might be "published" there. Publishing has a wider connotation than printing. Publishing implies editorial direction and selection of material, business management, and responsibility. It would seem that a paper might be published in a community despite the fact that a substantial part of its material were either ready print, mat, or plate material.

Unless a statute specifically states that printing must be done in a certain community if the newspaper is to be eligible for legal advertisements, it is immaterial where the printing is done; the place of publication is the place where the paper is first put into circulation, the place from which deliveries are sent out. In People ex rel. O'Connell v. Read,[177] it was held that the *Morgan Park Post* was not eligible for legal advertising, because the place of publication was in Chicago. Ordinarily, the place of publication is the same as the place of management in a city in which the publication is entered as second-class mail matter. In Rose v. Fall River Five Cents Savings Bank,[178] a question arose as to the place of publication of the *Dighton Rock*. This paper was one of a series printed and published in Fall River, under different names, such as the *Fall River Advertiser*, the *Somerset Times*, the *Freetown Journal, Swansey Record,* etc. All the papers in this series were essentially the same, except with different headings and datelines. It was held that the *Dighton Rock* was not published in Dighton; however the validity of the published notice was established for there had been a stipulation in the mortgage that notice be published in a Fall River newspaper.

[176] 127 Ohio St. 84, 186 N.E. 706 (1933).

[177] 256 Ill. 408, 100 N.E. 230, Ann. Cas.1913E, 293 (1912).

[178] 165 Mass. 273, 43 N.E. 93 (1896).

Although all statutes defining the term newspaper for the purpose of eligibility for legal advertisements do not mention the use of the English language, it may be presumed that it was the legislative intent to use the language of the country and the particular community so that there would be as great a dissemination of the public information as possible.

In Tylee v. Hyde,[179] the court stated:

> The English language is the means recognized by our law for communication and information; and while a paper printed in a foreign language may be a newspaper, it may not be within the purview of a statute requiring the publication of legal notices designed for the information of all the people, where the statute contains nothing to indicate an intention to include such a publication.

Even though a legal notice were printed in the English language in a newspaper principally printed in a foreign language, the publication would not be legal, because it would be contrary to legislative intent to publish in a newspaper circulating to a special language group. In Perkins v. Board of Commissioners of Cook County,[180] a notice was published in English though in a German language newspaper; it was held that so far as legal notice was concerned the publication was void, for the statute specified that notices be published in the English language, presumably meaning an English language newspaper.

If in a community in which Swedish, Italian, or German were the principal language, it would seem that notices might be published in the particular foreign language concerned, although in this modern day when English is so generally the language in which government business and school instruction are conducted, it would now seem unnecessary that any language other than English be used.

[179] 60 Fla. 389, 394, 52 So. 968, 969 (1910).

[180] 271 Ill. 449, 111 N.E. 580, Ann. Cas.1917A, 27 (1916).

APPENDIX A

ABBREVIATIONS

A. - - - - - - Atlantic Reporter.
A.2d - - - - - Atlantic Reporter, Second Series.
A.C. - - - - - Appeal Cases.
A.L.R. - - - - - American Law Reports.
A. & E. - - - - Adolphus & Ellis, Queen's Bench Reports (England).
Aff. - - - - - - Affirmed; affirming.
Ala. - - - - - Alabama;—Alabama Supreme Court Reports.
Am.Dec. - - - - American Decisions.
Am.Jur. - - - - American Jurisprudence, a legal encylopedia.
Am.Rep. - - - - American Reports.
Am.St.Rep. - - American State Reports.
Ann.Cas. - - - - American Annotated Cases.
App.D.C. - - - - Court of Appeals, District of Columbia.
App.Div. - - - - New York Supreme Court, Appellate Divisions, Reports.
Ariz. - - - - - Arizona; Arizona Supreme Court Reports.
Ark. - - - - - Arkansas; Arkansas Supreme Court Reports.
B. & A. - - - - Barnewall & Adolphus, King's Bench Reports (England).
B. & C. - - - - Barnewall & Cresswell, King's Bench Reports (England).
B. & S. - - - - Best & Smith, Queen's Bench Reports (England).
Beav. - - - - - Beavan, Rolls Court Reports (England).
Bing. - - - - - Bingham, New Cases, Common Pleas (England).
Blackf. - - - - Blackford, Indiana Reports.
Blatchf. - - - - Blatchford, United States Circuit Court Reports.
Bos. & Pul. - - - Bosanquet & Puller, Common Pleas Reports (England).
Burr. - - - - - Burrows, King's Bench Reports (England).
C.D. - - - - - Copyright Decisions.
C.J. - - - - - - Corpus Juris, legal encyclopedia.
Cal. - - - - - - California; California Supreme Court Reports.
Can.Sup.Ct. - - - Canada Supreme Court Reports.
Cert. - - - - - Certiorari, a legal writ by which a cause is removed from an inferior to a superior court.
Ch.Div. - - - - Chancery division, law reports (England).
Colo. - - - - - Colorado; Colorado Supreme Court Reports.
Conn. - - - - - Connecticut; Connecticut Supreme Court of Errors Reports.
Cowp. - - - - - Cowper, King's Bench Reports (England).
Cranch - - - - Cranch United States Supreme Court Reports; United States Circuit Court Reports.
Cush. - - - - - Cushing (Mass.).
D.C.App. - - - - District of Columbia Court of Appeals Reports.
Dall. - - - - - Dallas, United States Supreme Court Reports; Pennsylvania Reports.

Del. - - - - - - Delaware; Delaware Supreme Court Reports.
Durn. & E. - - Durnford and East's Reports (England).
E.L.R. - - - - - Eastern Law Reporter (Canada).
East - - - - - - East, King's Bench Reports (England).
Edw. - - - - - - Edward; refers to a particular king of England; which king of that name is indicated by the date; used to identify an act of Parliament.
Eng.Rep. - - - - English Reports (reprint).
Err. & App. - - New Jersey Court of Errors and Appeals.
F. - - - - - - - Federal Reporter.
F.2d - - - - - - Federal Reporter, Second Series.
F.Supp. - - - - Federal Supplement.
Fed.Cases, Fed.Cas. or F.Cas. - - - Reports of United States Circuit and District Courts, 1789–1879.
Fla. - - - - - - Florida; Florida Supreme Court Reports.
Flip. - - - - - - Flippin, United States Circuit Court Reports.
Ga. - - - - - - - Georgia; Georgia Supreme Court Reports.
Ga.App. - - - - Georgia Appeals Reports.
Geo. - - - - - - George; refers to a particular king of England; accompanying date indicates what George is meant; acts of Parliament are indicated by the name of the ruling king or queen.
Harr.(Del.) - - Harrington Reports (Delaware).
How. - - - - - - Howard, United States Supreme Court Reports.
How.St.Tr. - - - Howell's State Trials.
Hun - - - - - - Hun, New York Supreme Court Reports.
Ibid. - - - - - - Ibidem, the same, in the same volume, or on the same page.
Ill. - - - - - - - Illinois; Illinois Supreme Court Reports.
Ill.App. - - - - Illinois Appellate Court Reports.
Ind. - - - - - - Indiana; Indiana Supreme Court Reports.
Ind.App. - - - - Indiana Appellate Court Reports.
Ind.L.R.Alla. - - Indian Law Reports, Allahabad Series (India)
Johns.Cas. - - - Johnson's Cases (New York).
Johns.Rep. - - - Johnson's Reports (New York).
K.B. - - - - - - King's Bench Reports (England).
Kan. - - - - - - Kansas; Kansas Supreme Court Reports.
Ky. - - - - - - Kentucky; Kentucky Court of Appeals Reports.
L.J. - - - - - - Law Journal (England).
L.J.Ex. - - - - Law Journal, Exchequer (England).
L.J.Q.B. - - - - Law Journal Reports, Queen's Bench (England).
L.R.A. - - - - - Lawyers Reports Annotated
L.R.A., N.S., - - Lawyers Reports Annotated, New Series.
L.R.C.P. - - - - English Law Reports, Common Pleas.
L.R.Ex. - - - - Law Reports, Exchequer (England).
L.T. - - - - - - The Law Times (England).
La. - - - - - - Louisiana; Louisiana Supreme Court Reports.
La.Ann. - - - - Louisiana Annual Reports.
Lack.Legal News. - Lackawanna Legal News (Pa.).
Mac. & G. - - - Macnaghten & Gordon, Chancery Reports (England).

Mass. - - - - - - Massachusetts; Massachusetts Supreme Judicial Court Reports.
Md. - - - - - - Maryland; Maryland Court of Appeals Reports.
Me. - - - - - - Maine; Maine Supreme Judicial Court Reports.
Mees. & W. - - Meeson & Welsby, Exchequer Reports (England).
Mich. - - - - - Michigan; Michigan Supreme Court Reports.
Minn. - - - - - Minnesota; Minnesota Supreme Court Reports.
Miss. - - - - - Mississippi; Mississippi Supreme Court Reports.
Mo. - - - - - - Missouri; Missouri Supreme Court Reports.
Mo.App. - - - - Missouri Appeals Reports.
Mod. - - - - - - Modern Reports, King's Bench (England).
Mont. - - - - - Montana; Montana Supreme Court Reports.
N.C. - - - - - - North Carolina; North Carolina Supreme Court Reports.
N.D. - - - - - - North Dakota; North Dakota Supreme Court Reports.
N.E. - - - - - - Northeastern Reporter.
N.E.2d - - - - Northeastern Reporter, Second Series.
N.H. - - - - - - New Hampshire; New Hampshire Supreme Court Reports.
N.J. - - - - - - New Jersey; New Jersey Court of Errors and Appeals Reports.
N.J.Eq. - - - - New Jersey Equity Reports.
N.J.L. - - - - - New Jersey Law Reports.
N.M. - - - - - - New Mexico; New Mexico Supreme Court Reports.
N.W. - - - - - - Northwestern Reporter.
N.Y. - - - - - - New York; New York Court of Appeals Reports.
N.Y.Cr.R. - - - New York Criminal Reports.
N.Y.St.Rep. - - - New York State Reports.
N.Y.S. - - - - - - New York Supplement Reports.
Neb. - - - - - - Nebraska; Nebraska Supreme Court Reports.
Nev. - - - - - - Nevada; Nevada Supreme Court Reports.
Nisi Prius - - - Unless before. Used in connection with the courts of assize and nisi prius (England). Judgment would stand unless before (nisi prius) the fifth day after the return of the verdict, one of the parties moved for a new trial.
Ohio App. - - - Ohio Appeals Reports.
Ohio N.P. - - - Ohio Nisi Prius Reports.
Ohio Ops. - - - Opinions, Attorney General, Ohio.
Ohio St. - - - - Ohio State Reports.
Ohio Sup. & C.P. Dec. - - - - Ohio Superior and Common Pleas Decisions.
Okl. - - - - - - Oklahoma; Oklahoma Supreme Court Reports.
Ops. - - - - - - Opinions, as of Attorney General of the United States, or a state.
Or., Ore., Oreg. - Oregon; Oregon Supreme Court Reports.
P. - - - - - - - - Pacific Reporter.

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P.2d - - - - - - Pacific Reporter, Second Series.
P.L. & R. - - - Postal Laws and Regulations (1940 ed.)
Pa. - - - - - - Pennsylvania; Pennsylvania Supreme Court Reports; Pennsylvania State Reports.
Pa.D. & C. - - - Pennsylvania District and County Court Reports.
Pa.Super. - - - Pennsylvania Superior Court Reports.
Paige - - - - - Paige, New York Chancery Reports.
Pennewill - - - Pennewill, Delaware Reports.
per se. - - - - - In itself or by itself; used in connection with words actionable *per se*, libelous *per se*, or slanderous *per se*.
Pet. - - - - - - Peter's United States Supreme Court Reports.
Phila. (Pa.) - - Philadelphia Reports.
Pick. - - - - - - Pickering, Massachusetts Reports.
Q.B. - - - - - - Queen's Bench.
R. - - - - - - - Rex, king; regina, queen.
R.C.L. - - - - - Ruling Case Law.
R.I. - - - - - - Rhode Island; Rhode Island Supreme Court Reports.
Rich. (S.C.) - - Richardson, South Carolina Law Reports.
S.C. - - - - - - South Carolina; South Carolina Supreme Court Reports.
S.D. - - - - - - South Dakota; South Dakota Supreme Court Reports.
S.E. - - - - - - Southeastern Reporter.
S.E.2d - - - - Southeastern Reporter, Second Series.
S.W. - - - - - - Southwestern Reporter.
S.W.2d - - - - Southwestern Reporter, Second Series.
Sandf. - - - - Sandford, New York Superior Court Reports.
Sec. - - - - - - Section.
Serg. & R. - - - Sergeant & Rawle, Pennsylvania Reports.
Sid. - - - - - - Siderfin, King's Bench Reports (England).
So. - - - - - - Southern Reporter.
Stark. - - - - - Starkie, English Reports.
S.Ct. - - - - - Supreme Court Reporter.
Swans. - - - - Swanston, Chancery Reports (England).
T.L.R. - - - - - Times Law Reports (England).
T.R. - - - - - - Term Reports, Durnford & East (England).
Taunt. - - - - Taunton, Common Pleas Reports (England).
Tenn. - - - - - Tennessee; Tennessee Supreme Court Reports.
Tex. - - - - - - Texas; Texas Supreme Court (and the Commission of Appeals) Reports.
Tex.Civ.App. - - Texas Civil Appeals Reports.
Tex.Cr.R. - - - Texas Court of Criminal Appeals Reports.
U.S.C. - - - - - United States Code.
U.S.C.A. - - - - United States Code Annotated.
U.S.P.Q. - - - - United States Patents Quarterly.
V. - - - - - - - Volume.
Va. - - - - - - - Virginia; Virginia Supreme Court of Appeals Reports.
Vict. - - - - - - Victoria, Queen of England, 1876–1901; refers to act of Parliament passed in her reign.

THAYER CONTROL OF PRESS

Vt. - - - - - - - Vermont; Vermont Supreme Court Reports.
W.Va. - - - - - - West Virginia; West Virginia Supreme Court of Appeals Reports.
Wash. - - - - - - Washington; Washington Supreme Court Reports.
Wash.L.Rep. - - Washington Law Reporter, Washington, D. C.
Wend. - - - - - - Wendell (N.Y.).
Whart. - - - - - Wharton (Pa.).
Wheat. - - - - - Wheaton (U.S.)
Wis. - - - - - - Wisconsin; Wisconsin Supreme Court Reports.
Wyo. - - - - - - Wyoming; Wyoming Supreme Court Reports.
Y.B. - - - - - - Year Books (England).
Yeates - - - - - Yeates, Pennsylvania Reports.

APPENDIX B

SELECTED COURT AND PLEADING TERMS

Actionable per se
Words that need no explanation in order to determine their defamatory effect.

Answer
The pleading of a defendant against whom a complaint has been filed.

Appellant
A party who seeks to remove his case to a higher court for further adjudication.

Appellee
A party adverse to the appellant.

Common law
The law of the decided cases; fundamentally, the law as established in England by the common law judges primarily from the eleventh to the nineteenth century; the ancient customary law of England; the law of judicial decisions as distinguished from statutory law. Legal precedent as established by judicial decisions in England and adopted informally by the American colonies prior to 1776.

Complaint
The initial pleading in code procedure.

Damnum absque injuria
Damage without legal injury.

Declaration
The first pleading filed by the plaintiff in a case under common law procedure.

Decree
The judicial decision of a court of equity.

Defendant
Party against whom a civil or criminal action is instituted.

Demurrer
A formal denial of the legal effectiveness of an opponent's pleading.

Dictum, dicta
Thing said, things said.

Equity
That system of jurisprudence which gives relief when there is no full, complete and adequate remedy at law; based originally upon the custom of appealing to the King or chancellor when the formality of the common law did not give means for relief.

Ex parte
From or concerning only one party.

Indictment
A written accusation prepared by the prosecuting attorney and presented for the consideration of the grand jury.

Information
A formal, written accusation prepared by a law officer of the government, such as the district or prosecuting attorney.

Injunction
A judicial order in equity directed against a person commanding him to perform or refrain from doing a particular act.

Injuria absque damno
Legal injury without actual loss.

Judgment
The decision of a court of law.

Malum prohibitum, mala prohibita
Act prohibited, acts prohibited.

Malum in se, mala in se
Act wrong in itself, acts wrong in themselves.

Mandamus
An extraordinary legal writ issued from a court of superior jurisdiction to a corporation or its officers, to a public official, or to an inferior court commanding the doing of a ministerial act which the person, corporation addressed, or court is under a duty to perform, or the restoration of some right or privilege being denied to a complainant.

Motion to dismiss
A formal application by a litigant or his counsel addressed to the court for an order by the court in reference to the case being tried or about to be tried.

Nol pros; Nolle prosequi
To be unwilling to prosecute. An entry made on the court record that the prosecution does not wish to proceed with the case further.

Obiter dictum; plural, obiter dicta
An opinion by the court given aside the main issue, or a saying by the way.

Onus, onus probandi
Burden, burden of proving.

Plaintiff
Party who initiates a legal action.

Plea
Technically, the first pleading of a defendant to the declaration of the plaintiff, under common law procedure.

Replication
The plaintiff's formal pleading to the plea first filed by the defendant under common law procedure.

Reply
The pleading of the plaintiff to the answer of the defendant under the system of code pleading.

Res Adjudicata, or res judicata
A thing decided.

Respondent
A party who gives answer to a bill in equity; also one who opposes a party who has taken a case to a higher court.

Rule nisi
A rule which will become mandatory *unless* cause be shown why the contrary should be held.

Stare decisis
To stand by the decisions. To maintain a precedent.

Verdict
The decision of a jury as reported to the court.

APPENDIX C

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